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v. 2730

No. 13011

United States Court of Appeals

FOR THE NINTH CIRCUIT

BERNICE FEITLER and IRWIN FEITLER,
Individually and Trading as Gardner & Company,
Petitioners,
vs.

FEDERAL TRADE COMMISSION,
Respondent.

BRIEF AND ARGUMENT FOR PETITIONERS.

PETITION TO REVIEW AN ORDER OF
THE FEDERAL TRADE COMMISSION

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BRIEF AND ARGUMENT FOR PETITIONERS.

STATEMENT OF THE PLEADINGS.

The Commission issued its complaint on the 28th day of August, 1940. The complaint alleges in substance as follows: that the petitioners manufacture push cards and punch boards, selling and distributing them in interstate commerce to manufacturers of and dealers in, various other articles of merchandise. Some of the push cards and punchboards are so prepared that when used by persons other than Petitioners in selling merchandise to the consuming public they involve games of chance.

Many persons who sell and distribute candy, cigarettes, clocks, razors, cosmetics, clothing, and other articles of merchandise in interstate commerce purchase Petitioners' push cards and punchboards, pack and assemble them together with merchandise and sell them to retail dealers. Other retail dealers purchase the cards and boards directly from Petitioners and make up their own assortments.

The retailers sell the merchandise to the purchasing public by means of the push cards and punchboards.

The element of chance involved induces members of the public to deal with such retailers and this in turn induces retailers to deal with manufacturers and wholesalers who assemble their merchandise with the push cards and punchboards.

The respondents thus supply to, and place in the hands of, and instrumentalities for, engaging in unfair methods of competition in commerce and unfair acts and practices in commerce within intent and meaning of the Federal Trade Commission Act.

Petitioners' answer amounts to a general denial.

STATEMENT OF THE FACTS.

Petitioners manufacture punchboards and push cards which they sell to other persons, firms and corporations. Some of petitioners' products are used to distribute merchandise. The only persons, firms or corporations who use punchboards as chance devices to distribute merchandise are persons, firms and corporations who are engaged exclusively in intrastate commerce.

After issues were joined the Commission held hearings in Terre Haute, Indiana, Chicago, Illinois, Milwaukee, Wisconsin, Minneapolis, Minnesota, South Bend, Indiana, Indianapolis, Indiana, Louisville, Kentucky, and Ottumwa, Iowa. At these hearings most of the testimony introduced by the Commission was indirect and opinion evidence.

At the Petitioners' request the trial examiner set hearings in Salt Lake City, Utah, Seattle, Washington, Portland, Oregon, San Francisco and Los Angeles, California.

At the hearing in Salt Lake City the attorney for the Commission, after the first main witness called by the Petitioners had finished testifying, made a motion to strike all of the witness' testimony. The Trial Examiner granted the said motion upon the sole ground that the testimony of the witness did not tend to disprove the evidence introduced by the Commission. Because of this ruling the hearings scheduled for Seattle, Portland, San Francisco and Los Angeles were cancelled. Subsequently the Petitioners filed a motion with the Commission requesting the Commissioners to make an order setting aside this ruling of the Trial Examiner. The motion was denied. Several times thereafter Petitioners requested hearings at different cities. The Trial Examiner in denying Petitioners' requests to have hearings at certain designated places made the following rule:

“I now feel that respondents are entitled to negative testimony that has been presented against them. Since this testimony had to do with conditions existing in fairly well defined territory, it seems to me that any bearing that conditions existing in other and far remote territory may have to negative the testimony for the Commission is too vague and indefinite to justify the admission of testimony on those conditions in this case at this time, though the testimony might become material if an order should issue and steps for enforcement in other territory were taken.”

The Commission having refused to set hearings at locations requested by the Petitioners, the Petitioners held hearings at places wherein the Commission had held hearings. However, Petitioners were not able to introduce the type of evidence that they desired to introduce. The Trial Examiner closed the taking of testimony in this proceeding and the attorney for the Commission and the attorney for the Petitioners submitted to the Trial

Examiner proposed findings of fact. The Trial Examiner ignored the proposed findings submitted by the Petitioners and adopted almost *verbatim* the findings submitted by the Commission. Thereafter Petitioners filed a motion supported by affidavits, with the Commission requesting that the above ruling of the Trial Examiner be set aside and that hearings be scheduled at certain designated cities. The Commission denied this motion. After the attorney for the Commission and the attorney for the Petitioners submitted briefs and argued the matter orally before the Commission, the Commission made its report as to the findings of fact and issued its order to cease and desist.

The findings are in substance the same as the allegation of the complaint. The order is as follows:

“It is Ordered that the respondents, Bernice Feitler and Irwin Feitler, individuals trading under the name of Gardner & Company, or trading under any other name, their agents, representatives and employees, directly or through any corporate or other device, do forthwith cease and desist from:

Selling or distributing in commerce, as ‘Commerce’ is defined in the Federal Trade Commission Act, push cards, punchboards, or other lottery devices, which are to be used or may be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.”

This order is much broader than the allegations in the complaint and the findings of fact.

Grounds of Jurisdiction.

The petition filed in this Court alleges that petitioners do business within the jurisdiction of this Court.

Section 5 of the Federal Trade Commission Act (52 Stat. 111; 15 U.S.C.A., Sec. 45.) provides in part as follows:

“(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, * * *”.

Statement of the Case.

This case involves first the question of due process of law and second the jurisdiction of the Federal Trade Commission.

Assignments of Errors.

1.

The hearing granted petitioners herein did not comply with the due process clause of the Constitution nor with the Administrative Practice Act.

2.

The Commission does not have jurisdiction to restrain the interstate shipment of push cards and punchboards.

3.

The order issued herein is broader in scope than the complaint and the findings.

4.

The order issued herein is too broad.

5.

This proceeding by the Commission is not in the public interest as required by the Federal Trade Commission Act.

ARGUMENT.

As the order to cease and desist issued herein was not obtained by due process of law it is null and void and must be set aside.

All cease and desist orders issued by the Federal Trade Commission which are not moored to and anchored in due process of law are not only null and void but must be summarily set aside. If in reviewing a proceeding conducted by the Federal Trade Commission wherein a cease and desist order has been issued, it appears that due process of law has not been fully, strictly and completely complied with the court has no alternative but to set aside the order on this ground alone without going into the merit on the issues raised by the pleadings. Fortunately by virtue of the constitution no administrative agency has nor can it be given jurisdiction to issue a cease and desist order without first proceeding strictly in accordance with the inexorable safeguards of due process. The least or slightest deviation by the Commission from any of the requirements of due process vitiates all jurisdiction possessed by it to issue a final order. When due process is involved the ultimate result no matter how beneficial it may be can never justify the sacrifice of due process. In plain words, the safeguarding of due process is more important to the maintaining of a democracy than is the elimination of unfair acts and practices. In fact, our government proceeded very nicely from its inception until 1914 without the benefit of the Federal Trade Commission, but without due process of law a democracy would be of very short duration. Due process is the most important ingredient in the foundation upon which all

democracies are founded. It is the bulwark protecting free loving people against tyranny, without it tyranny would rage on unmolested. Because of these reasons the Supreme Court has emphatically and consistently held that whenever it appears that an Administrative order has been obtained without the strictest compliance with all of the ramifications of due process of law the order must be set aside.

A full and fair hearing is one of the cardinal essentials of due process of law. Unless the hearing conducted is of such a nature as may be required for a full and true disclosure of all of the facts due process of law has not been complied with. On this point we set out the following from the Supreme Court:

Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 277 U. S. 88-91:

“A finding without evidence is arbitrary and baseless. And if the Government’s contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the constitution’s condemnation of all arbitrary exercises of power.

In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair.”

This case is especially applicable to the case at bar; the Commission herein disregarded all the rules of evidence,

and capriciously made findings and issued its order by administrative fiat.

St. Joseph Stock Yards Company, Appellant, v. United States and the Secretary of Agriculture, 298 U.S. 38:

“The inexorable safeguard which the due process clause assures is not that a court may examine whether the findings as to value or income are correct, but that the trier of the facts shall be an impartial tribunal; that no finding shall be made except upon due notice *and opportunity to be heard*; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed.” (Emphasis provided).

And in the case of *The Ohio Bell Telephone Company v. The Public Utilities Commission of Ohio*, 301 U. S. 292:

“Regulatory Commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. *West Ohio Gas Co. v. Public Utilities Commission* (No. 1), *supra*, p. 70; *West Ohio Gas Co. v. Public Utilities Commission* (No. 2), 294 U.S. 79; *Los Angeles Gas & Electric Corp. v. Railroad Commission of California*, 289 U.S. 287, 304. Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the ‘inexorable safeguard’ (*St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 73) of a fair and open hearing be maintained in its integrity. *Morgan v. United States*, 298 U.S. 468, 480, 481; *Interstate Commerce Commission v. Louisville & N. Ry. Co.*, *supra*.

The right to such a hearing is one of 'the rudiments of fair play' (*Chicago, M. & St. P. Ry. Co., v. Polt*, 232 U.S. 165, 168, assured to every litigant by the Fourteenth Amendment as a minimal requirement. *West Ohio Gas Co. v. Public Utilities Commission* (No. 1), (No. 2), *supra*; *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 682, *Cf. Norwegian Nitrogen Co. v. United States, supra*. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

On this point the Administrative Practice Act provides " * * * every Administrative Agency shall afford all interested parties the right to present his case or defense. * * * *As may be required for a full and true disclosure of the facts.*" Emphasis provided)

Petitioners contend that because of the following ruling made and adhered to by the Trial Examiner and upheld and adhered to by the Federal Trade Commission the petitioners herein were deprived of a full and fair hearing. The said ruling is as follows:

"The respondents (petitioners here) are only entitled to introduce evidence which will negative the testimony that the Commission has introduced and that hearings on behalf of the Petitioners can only be had in the same territory in which the Commission held hearings (Tr. 35). The Trial Examiner in denying petitioners' motion to have hearings at certain places stated, 'I now feel that respondents are entitled to negative testimony that has been presented against them. Since this testimony had to do with conditions existing in fairly well defined territory, it seems to me that any bearing that conditions existing in other and far remote territory may have to negative the testimony for the Commission is too vague and indefinite to justify the admission of tes-

timony on those conditions in this case at this time, though the testimony might become material if an order should issue and steps for enforcement in other territory were taken.' '' (Tr. 33-37).

The fallacy and absurdity of this ruling is made apparent by the following illustrations;

First, take a case where one of the material issues is, what was the condition of the brakes of one of the automobiles involved in an accident? The plaintiff at the trial calls a witness who testifies that he saw the accident and went over and looked at the cars, but made no examination; he testified that in his judgment the brakes on the car were defective. This evidence proves the indirect fact that the witness is of the opinion that the brakes were defective. From this indirect fact standing alone the ultimate fact, that the brakes were defective, may be inferred. To negative the inference which may be drawn from the fact that the witness was of the opinion that the brakes were defective and to establish what was the true condition of the brakes at the time of the accident the defendant in rebuttal offers in evidence one witness who would testify if permitted that he relined the brakes and adjusted them within 10 days prior to the accident and another witness, a mechanic, who would testify that he examined the brakes immediately after the accident and found them in perfect condition. Under the ruling of the Trial Examiner these two witnesses would not be allowed to testify because their testimony does not tend to negative the testimony of the plaintiff's witness, which is that the witness is of the opinion that the brakes were defective.

Such a ruling amounts to changing the issues involved. The issue should always be, "Were the brakes defective?" But under the Trial Examiner's ruling the issue is, did

the plaintiff's witness have the opinion that the brakes were defective? By virtue of such a ruling defendants are deprived of the right to introduce evidence bearing on the true issues, being limited to the introduction of evidence to disprove the opinion of the Commission's witnesses which is not an issue in the case at all.

The second illustration: the question involved in a case is the speed of an automobile at the time of an accident. The plaintiff at the trial introduces a witness who testifies that a mile away from the accident the car in question when it passed him was traveling at a rate of 65 miles an hour. In rebuttal the defendant wishes to show that between the point where the witness saw the car and the point of accident the car stopped for a stop sign and at the time of the accident was not exceeding 10 miles an hour. Under the Trial Examiner's ruling this testimony would not be admissible because it does not tend to disprove the testimony of the plaintiff's witness.

The same is true in this illustration as in the other illustration, the issues have been changed. The real issue in the case is, how fast was the car traveling at the time of the accident? But the ruling confines defendant's testimony to the issue, how fast was the car traveling when it passed the witness? The defendant is not allowed to introduce any evidence bearing upon the real issue, the rate of speed at the time of the accident.

In each of the above illustrations the testimony of the witness for the plaintiff is technically inadmissible, primarily because the probative value of the testimony is not sufficient to make the evidence competent. However, as the Commission is not bound by the technical rules of evidence, such testimony was introduced and accepted by the Commission. In fact in the case at bar practically all

if not all of the Commission's testimony is of this caliber, being mainly opinion and indirect evidence. In spite of this, when the petitioners attempted to introduce evidence to substantiate the real issues involved and to show the inaccuracy of the opinion evidence introduced by the Commission and to introduce direct evidence to negative any probative value that the Commission's indirect evidence may have, the trial examiner affirming the above ruling refused the plaintiffs the opportunity to introduce their evidence.

Such a hearing is more vicious than no hearing at all because if no hearing was had, there would be no evidence, but in such a hearing as was granted, the Commission introduced evidence which by a wild use of the imagination may be sufficient to sustain their findings, whereas if no hearing was granted this remote and incompetent evidence would not be in the record. Plaintiffs feel certain that they can contend without any fear of contradiction that to be granted a hearing wherein the weakest type of circumstantial evidence, or what might be called, indirect incompetent evidence, is the only type of evidence introduced by the Commission, and when petitioners attempt to introduce direct competent evidence to negative any probative value this testimony may have and also to establish the ultimate facts by direct evidence the Trial Examiner rules that the proffered evidence is not admissible upon the sole ground that it does not tend to disprove the testimony introduced by the Commission, and further rules that the only evidence that the plaintiffs will be allowed to introduce is evidence which will tend to disprove the Commission's evidence; the hearing thus granted the petitioners is more prejudicial than no hearing at all.

The ruling not only deprived the petitioners from introducing evidence on the main issues involved in the proceedings but limited the territory wherein plaintiffs could have hearings to the territory wherein the Commission conducted hearings.

It is beyond the comprehension of the writer, what the Examiner had in mind when he ruled that;

“Since this testimony had to do with conditions existing in fairly well defined territory, it seems to me that any bearing that conditions existing in other and far remote territory may have to negative the testimony for the Commission is too vague and indefinite to justify the admission of testimony on those conditions in this case at this time, though the testimony might become material if an order should issue and steps for enforcement in other territory were taken.”

What can it mean to say that the testimony is not admissible now but will be if steps for enforcement in other territories were taken? The fallacy of such a ruling seems to be self evident.

The above makes it self evident that the petitioners were not granted a fair and full hearing, therefore, the order must be set aside.

The interstate shipment of punchboards is not a practice deemed undesirable by the Congress.

This court in the case of *Lichtenstein v. Federal Trade Commission*, 194 F. (2) 607, stated;

“The object of the Federal Trade Commission Act is to reach not merely in their fruition but also in their incipency trade practices deemed undesirable by the Congress. Cf. *Fashion Guild v. Trade Commission*, 312 U.S. 457, 466, and *Federal Trade Commission v. Raladam Co.*, 316 U.S. 149, 152.”

This principle of law has no application to the interstate shipment of punchboards to persons, firms or corporations who use them exclusively in intrastate commerce, whether or not the boards are used to distribute merchandise. Under such a transaction there are two facts or acts involved: first, the act of shipping the punchboards in interstate commerce; second, the act of using the punchboards so shipped to distribute merchandise in intrastate commerce. Neither one of these acts or practices have ever been held by the Congress to be undesirable.

The Congress has had before it on several occasions bills to prohibit the interstate shipment of gambling devices, which would include the interstate shipping of punchboards, but not one of these bills has ever been passed by the Congress. If Congress had considered this Act undesirable it would have been a simple matter to have passed one of these Acts or to have included the prohibition of the interstate shipment of punchboards in the Federal Trade Commission Act or in the Slot Machine Act: but Congress emphatically rejected its inclusion into either of these enactments. In addition this court in the *Lichtenstein* case said:

“The cases construing similar cease and desist orders have all concerned the use of lotteries in merchandising. *Globe Cardboard Novelty Co. v. Federal Trade Commission*, 192 F. 2d 44 (Cir. 3) is similarly limited and should not be construed as conferring a general power over lotteries as such. The case of *Scientific Mfg. Co. v. Federal Trade Commission*, 124 F. 2d 640 (Cir. 3), made it clear that trade practices were the sole concern of the Commission.”

From the above it is clear that Congress has never deemed the interstate shipment of punchboards as undesirable.

Also, Congress has never deemed the intrastate use of punchboards to distribute merchandise or otherwise as undesirable. To this effect the Supreme Court in the case of *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349, held that Congress in the passing of the Federal Trade Commission Act expressly indicated that the intrastate use of punchboards was not deemed undesirable by it. If the Congress had at the time of the passing of the Federal Trade Commission Act or at the time of its amendment in 1938 deemed the intrastate use of punchboards to distribute merchandise undesirable it certainly would have granted the Commission power to prevent these acts and practices; or if subsequently the Congress deemed them undesirable it would have been and is now possible to prohibit these intrastate transactions. However, the Congress to date has still refrained from doing so.

The Congress' refusal to deem these intrastate transactions undesirable is based upon a very salutary basis. This basis is the proper respect that Congress has for our dual system of government. The only way that a Federal Government can be maintained is, that the Central Government must exercise a proper respect for the rights and prerogatives of the states which make up the Federation. Under this system of Government the question as to the desirability of the use of punchboards in strictly intrastate commerce must be left exclusively to the states.

In addition to the fact that the interstate shipment of punchboards is not deemed undesirable by the Congress, "the principle of law," that the purpose of the Federal Trade Commission Act is to reach undesirable acts and practices not merely in their fruition but also in their incipency" has no application in this case. We make

this statement because the practice of shipping punchboards in interstate commerce has been going on for many years and whatever use the boards are put to, also, has existed for many years, therefore, there are no practices in this regard in their incipency. This point will be emphasized in the discussion of the next point.

The use of punchboards to distribute merchandise has not spread into line after line of merchandise.

This Court in the *Lichtenstein* case said,

“The language of the Supreme Court in *Phalen v. Virginia*, 49 U.S. 163 (1850), as to the ‘pestilence’ of lotteries which ‘enters every dwelling * * * reaches every class * * * and preys upon’ and ‘plunders the ignorant and simple’ applies with force many times multiplied to the spread of lottery methods into line after line of merchandise.”

The petitioners believe that the court and the Commission have an erroneous conception as to the magnitude and significance of the use of punchboards generally and expressly in their use in the distribution of merchandise. This erroneous conception entertained by the courts and the Commission seems to be predicated on the misconceived idea that because of the innate instinct to take a chance possessed by every human being, punchboards have a magnetism strong enough to and do draw everyone to them: thereby making the use of punchboards to distribute merchandise not only an undesirable practice but a pestilence.

Had the petitioners been afforded a proper hearing, that is one which complied with due process of law and the administrative practice act there would now be in the record “a full and true disclosure of the facts,” which would show the fallacy of the above conception of the use of punchboards.

A full and true disclosure of the facts would establish the following:

The true situation surrounding the distribution of merchandise by the operation of punch boards is that very few people punch the boards; that the percentage of merchandise distributed by their use is negligible; that the number of establishments where boards can be operated is minor, and the variety of commodities that can be used as prizes is limited.

Contrary to the belief that many people punch the boards and to the Commission's finding (Tr. 31)

“Members of the purchasing public have been induced to trade or deal with retailers selling or distributing their merchandise through the use of such devices.”

The correct fact is that the punch boards have absolutely no appeal to the purchasing public; the purchasing public does not punch the boards. If petitioners' evidence was a part of the record herein the Commission's above finding would not be supported by the evidence for the reason that the petitioners' proposed finding on this point (sup. rt. 103 and 104) would be the only finding that the evidence as a whole would sustain on this issue. If the use of punch boards appealed to the purchasing public and to the public as a whole their use would be found in every retail store. The very opposite of this is the fact; punch boards are never found in a strictly retail store and are found only in places that do not retail the commodities used as prizes; their use is confined to taverns, pool halls and places wherein people are encouraged to loiter. The number of people that punch the boards equals about one in every thousand.

Contrary to the belief that the use of punch boards is spreading into line after line of merchandise, the fact is that because of the very nature of the appeal and use of punch boards a very small percentage of the total volume of merchandise sold and distributed is distributed by punch boards; this percentage is infinitesimal.

The use of punch boards to distribute candy is a very good illustration on this point. Punch boards have been used for years to distribute candy. The candy industry can be divided conveniently into about ten different branches. Of these different branches the fancy package branch is the smallest in volume, being about one percent of the total candy volume. The use of punch boards is confined exclusively to this smallest branch. The total amount of candy distributed by the use of punch boards does not exceed one-tenth of one percent of the total candy volume. If the use of punch boards had the capacity or tendency to spread into line after line of merchandise their use certainly would have spread into the different branches of the candy industry. However, after all these years of the use of punch boards in this industry their use is still confined solely to the fancy package branch, and the relative percentage to the volume of candy distributed by their use has remained the same, about one-tenth of one percent. The fact that the use of punch boards has not been able to spread into other branches of the candy industry, if not conclusive proof, has great weight in establishing that their use cannot spread into all lines of merchandise. The fact that the percentage of the volume distributed by the use of punch boards has remained constant, is also enough to prove that the use of boards does not possess the propensity to spread or increase.

The fact that the use of punch boards has been unable to spread into strictly retail stores and stores that retain the merchandise used for prizes and is still confined to the particular kind of places of business wherein people are solicited to loiter shows conclusively that their use cannot spread. This fact, also, establishes that punch boards have no appeal to the purchasing public and further establishes that not many places of business can use them.

Thus it is, the use of punchboards to distribute merchandise does not have the capacity or propensity to spread into line after line of merchandising, and the substantiality of their use is negligible.

Petitioners Proposed Findings of Fact Should Have Been Adopted.

Pursuant to the Federal Trade Commission rules petitioners submitted proposed findings of fact. The Trial Examiner and the Commission absolutely ignored them. These proposed findings are set out on pages 97-106 of the Supplement transcript of record. They speak for themselves and a casual reading of them will make it obvious that the Commission was in error in not adopting them as the Commission's findings in this case.

From what has been said above it seems to be self evident that petitioners' motion should be granted and this case returned to the Federal Trade Commission with instructions to set hearings at proper places and allow the petitioners to introduce their proffered evidence.

The decision in the case of *Globe Cardboard Novelty Co. et al v. Federal Trade Commission*, 192 F. 2d 444 is predicated upon an erroneous principle of law.

In the *Globe* case, *supra*, the court said,

“Since the decision of the Supreme Court in *Federal Trade Comm. v. Keppel & Bro.*, 291 U.S. 304 (1934), it has been settled law that the sale of merchandise by lottery methods constitutes an unfair method of competition under Section 5 of the Federal Trade Commission Act. Thus, we accept as our starting point the proposition that it is contrary to the public policy of the United States for sellers to market their goods by taking advantage of the consumer’s propensity to take a chance. Petitioners actively aid and abet others to commit such unfair practices.”

As the entire opinion in this case is based upon this erroneous interpretation of the *Keppel* case the holding therein is erroneous and should not be followed. The *Keppel* case did not settle that the sale of merchandise by lottery method constitutes an unfair method of competition under Section 5 of the Federal Trade Commission Act. The Supreme Court in that case simply held that under the findings of the Federal Trade Commission the *Interstate* shipments of break and take because of their adverse effect on interstate competitors is an unfair method of competition within Section 5 of the Federal Trade Commission Act. The holding that case is limited strictly to interstate transactions.

This principle of law is contrary to the principle of law on this point announced by Justice Minton, that the *Keppel* case is not in point nor has it any application to a case wherein the mere shipping of punchboards in interstate commerce is the only issue. *Modernistic Candies v. Federal Trade Commission*, 145 F. 2d 454.

Some time after the *Keppel* case the Supreme Court in the case of *Federal Trade v. Bunte Bros.*, 302 U.S. 349 held that the intrastate sale or distribution of merchandise by lottery methods did not constitute unfair methods of competition under Section 5 of the Federal Trade Commission Act, so that when the Third Circuit Court of Appeals assumed that the *Keppel* case held that such transactions were a violation of the Federal Trade Commission Act it ignored the holding in the *Bunte* case and in reality overruled the Supreme Court.

From the quoted portion from the *Globe* case, *supra*, it is self evident that the court in that case predicated its decision on the principle of law that the aiding and abetting of others to violate the Federal Trade Commission Act is within the purview of said act. This being the real basis of the decision the case cannot be used as authority to hold that the aiding and abetting of the intrastate use of punch boards to distribute merchandise comes within the jurisdiction of the Federal Trade Commission.

In the case of *Charles A. Brewer & Sons v. The Federal Trade Commission*, 158 Fed. 274, the court says,

“Thus, it is established beyond controversy that the Federal Trade Commission stands upon solid ground in declaring the sale of merchandise by lottery methods is in contravention of the public policy of the United States.”

Petitioners take issue with the court on this principle of law. It cannot be said that the sale of merchandise by lottery method has been singled out as being the only form of gambling or lottery that is against the public policy of the United States. If this form of lottery or gambling is against the public policy of the United States

then every form of gambling and every lottery must be placed in the same category. This being true, if the decision in the *Brewer* case is sound the Federal Trade Commission would have jurisdiction to stop any act in interstate commerce which aids and abets others in any form of intrastate gambling. Under such a holding the Commission would have authority to stop the interstate shipment of horses which are to be used at the different race tracks and the interstate shipment of the pari mutuel machinery. It could stop the interstate shipment of playing cards which are to be used in gambling and all the other items such as dice, roulette wheels, card tables and slot machines. Never has Congress nor any of the courts until the *Brewer* case, assumed, hinted or intimated that the Federal Government had the jurisdiction or power to form a public policy towards a strictly intrastate transaction. There is more money wagered at one meeting at the Santa Anita Race Track than there is wagered in one year on all the punch boards in the United States. There is no reason or logic upon which it can be maintained that the betting on the races at the track is not against the public policy of the United States but the intrastate use of punch boards to distribute merchandise is.

In addition to the illustration of the race track, let us call attention to Keno, Bingo games, Bank Night, and dice games. Most of these games are used for the distribution of merchandise, so that they are perfect illustrations.

The interstate shipment of punch boards to be used to distribute merchandise is not within the purview of the Federal Trade Commission.

The following portion of the brief is inserted primarily for the purpose of preserving the points discussed and

secondly because perhaps the writer's ideas were not clearly enough explained in the *Lichtenstein* and *Bork* cases.

The Federal Trade Commission Act confines the Commission's power to the stopping of the use of unfair methods of competition or unfair or deceptive acts and practices in commerce. The theory of the *Brewer*, *Globe*, *Hamilton*, *Bork* and *Lichtenstein* cases is that under such a statute the Commission has the right to stop anyone who aids, abets, induces or procures others to violate the act. In other words the theory of these cases is that the word, "using" can be construed to mean aiding, abetting, inducing and procuring.

The petitioners contend that such a construction is not permissible under the rule of strict construction which must be applied to the Federal Trade Commission Act.

Under the rule of law laid down by the Supreme Court in the case of Federal Trade Commission v. Bunte Bros. The order issued herein is too broad.

As has been shown above the *Brewer* case and the *Globe* case sustained a Federal Trade Commission order which was as broad as the order issued in this case. The order restrains the petitioners from shipping boards not only to people who use them in a manner which violates the Federal Trade Commission Act but to people who use them in intrastate transactions which transactions have been held by the Supreme Court not to be within the jurisdiction of the Federal Trade Commission. It is the petitioners' contention that the order herein must be modified to be within the principle of law announced in the *Bunte* case.

The words “or may be used” should be deleted from the order.

The order provides in part as follows:

“Selling or distributing in commerce, as ‘commerce’ is defined in the Federal Trade Commission Act, push cards, punch boards, or other lottery devices, which are to be used or may be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.”

The petitioners contend that the words “Or may be used” should be deleted from the order. *Cf. Hamilton Mfg. Co. v. Federal Trade Commission*, 194 F. 2d 346 (D.C. Cir.), decided January 24, 1952; *Lee Boyer’s Candy v. Federal Trade Commission*, 128 F. 2d 261 and cases there cited.

Petitioners’ Boards Are Not Gambling Devices Per Se.

All of petitioners’ boards are numerically keyed to an answer book. Every ticket in every board has printed upon it a question and a book containing the correct answer to each question is furnished. This places petitioners’ boards in the same category with playing cards, dice, and all similar devices. *D’Orio v. Startup Candy Company*, 71 Utah 410, 266 Pac. 1037, 60 A.L.R. 338; *The Question Game Company v. Ploner*, 273 Ill. Appellate 187; *D’Orio v. Cataland*, 260 Ill. App. 626; *D’Orio v. Jacobs*, 151 Wash. 297, 275 Pac. 563; *Johnson v. McDonald*, 132 Ore. 622, 287 Pac. 220.; *Boatwright v. State*, 118 Texas R. 381, 38 S. W. 2d 87.

This Proceeding Is Not in the Interest of the Public

This court in the *Lichtenstein* case said:

“Petitioner further urges that the prevention of the use of its gambling devices in the sale of mer-

chandise to the ultimate consumer is not in the public interest.”

These petitioners make no point as to whether or not it is to the interest of the public to prevent the use of gambling devices in the sale of merchandise to the ultimate consumer. Our point is that as this proceeding is not against such a practice nor has it any effect upon it, this question is not involved in the case.

As this proceeding will not have any effect upon the use of gambling devices in the sale of merchandise to the ultimate consumer, as to this end the proceeding is a nullity. It certainly is not to the public interest to have the Commission incur all the expenses incident to the prosecution of these proceedings when the result is a nullity. The public can best be protected from this use of gambling devices by local law. Local laws are adequate enough to give the public proper protection, without any help from the Federal Government, especially when the attempted help is futile.

The petitioners respectfully submit that the above order should be set aside. If not set aside, it should be modified.

Respectfully,

F. W. JAMES,
Attorney for Petitioners.

Of Counsel

GEORGE E. LINDELOF, JR.

No. 13011

**In the United States Court of Appeals
for the Ninth Circuit**

**BERNICE FEITLER AND IRWIN FEITLER, INDIVIDUALLY
AND TRADING AS GARDNER & COMPANY, PETITIONERS**

v.

FEDERAL TRADE COMMISSION, RESPONDENT

**ON PETITION TO REVIEW AN ORDER OF THE
FEDERAL TRADE COMMISSION**

BRIEF FOR RESPONDENT

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In the United States Court of Appeals for the Ninth Circuit

No. 13011

**BERNICE FEITLER AND IRWIN FEITLER, INDIVIDUALLY
AND TRADING AS GARDNER & COMPANY, PETITIONERS**

v.

FEDERAL TRADE COMMISSION, RESPONDENT

*ON PETITION TO REVIEW AN ORDER OF THE
FEDERAL TRADE COMMISSION*

BRIEF FOR RESPONDENT

I

STATEMENT OF THE CASE

This is an administrative law proceeding arising upon petition to review and set aside an order to cease and desist issued by the Federal Trade Commission, respondent, pursuant to a Commission complaint charging petitioners with engaging in unfair acts and practices in commerce in violation of the Federal Trade Commission Act.¹

¹The pertinent provisions of the statute are as follows:

"SEC. 5 (a). * * * Unfair or deceptive acts or practices, in commerce, are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons, partnerships or corporations * * * from using * * * unfair or deceptive acts or practices in commerce." 52 Stat. 111-112; 15 U. S. C. 45 (a).

The complaint (Tr. R. pp. 3-9) alleged (Tr. R. pp. 3-4) that Bernice Feitler and Irwin Feitler,² individuals trading as Gardner & Company, with their principal office located at 2309 Archer Avenue, Chicago, Illinois, and branch offices in Philadelphia, Pennsylvania, New Orleans, Louisiana, and San Francisco, California, were engaged in the manufacture, and in the sale and distribution in interstate commerce to manufacturers of, and dealers in, merchandise in commerce, of various types of push cards and punch boards, all designed, prepared, and arranged so that when used in selling merchandise, a game of chance, gift enterprise, or lottery scheme is involved.

The complaint further alleged (Tr. R. pp. 6-7) that many persons, firms, and corporations who distribute and sell merchandise in interstate commerce and in the District of Columbia, purchase petitioners' push cards and punch boards and pack and assemble assortments of merchandise with said boards; that retail dealers who purchase such assortments from manufacturers or wholesale jobbers, and retail dealers who purchase petitioners' devices direct from petitioners and make up their own assortments, expose such assortments to the purchasing public and have sold such merchandise by means of petitioners' push cards and punch boards; that because of the element of chance involved, members of the purchasing public have been induced to buy from such retail dealers, and

² Several other individuals were named as respondents. The Commission, however, found that prior to the issuance of the complaint these respondents had sold their interest in the business to petitioners. The Commission therefore dismissed the complaint as to these.

as a result many retail dealers have been induced to deal with manufacturers, wholesale dealers, and jobbers who distribute petitioners' push cards and punch boards with their merchandise.

The complaint further alleged (Tr. R. p. 8) that the sale of merchandise to the public by the use of push cards and punch boards involves a game of chance or the sale of a chance to procure merchandise at less than normal retail prices; teaches and encourages gambling among members of the public, all to the injury of the public; and is a practice which is contrary to an established public policy of the Government of the United States and constitutes an unfair method of competition and an unfair act and practice in commerce.

The complaint further alleged (Tr. R. p. 8) that by the sale of their push cards and punch boards, petitioners supply to, and place in the hands of, others the means of conducting lotteries, games of chance, or gift enterprises in the sale or distribution of merchandise; thus providing others with the means of, and instrumentalities for, engaging in unfair methods of competition in commerce and unfair acts and practices in commerce in the sale of merchandise.

On the basis of the above allegations, the complaint charged (Tr. R. p. 9) that the acts and practices of petitioners are all to the prejudice and injury of the public and constitute unfair acts and practices in commerce in violation of the Federal Trade Commission Act.

By their answer (Tr. R. pp. 12-14), petitioners admitted that they were partners trading and doing

business as Gardner & Company, but other than this, denied all allegations of the complaint.

After the taking of evidence on behalf of the Commission and petitioners, the Commission on the 3rd day of May 1951 made its findings as to the facts (Tr. R. pp. 26-32) which accord with the allegations of the complaint as above outlined, concluded (Tr. R. p. 32) that petitioners' acts and practices are "all to the prejudice and injury of the public and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act," and entered its order (Tr. R. pp. 24-26) directing petitioners to cease and desist from:

Selling or distributing in commerce as "commerce" is defined in the Federal Trade Commission Act push cards, punch boards or other lottery devices, which are to be used or may be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.

Thereafter, on the 5th day of July 1951, petitioners filed their motion (Tr. R. pp. 33-62) to set aside the cease and desist order and reopen the proceedings for the purpose of receiving additional evidence. On the 9th day of August 1951, the Commission entered an order denying this motion (Tr. R. pp. 62-63).

Petitioners thereafter filed their petition to review and set aside the Commission's order (Tr. R. pp. 89-92) and their Statement of Points upon which they intended to rely (Tr. R. p. 93). On the 3rd day of December 1951, petitioners filed a Supplemental State-

ment of Points (Tr. R. p. 94) and a Supplemental Designation of the Record (Tr. R. p. 95).³

Most of the points which petitioners in their Statements of Points said they relied on are not developed or argued in their brief. The points not argued are therefore abandoned.⁴

II

QUESTIONS PRESENTED

Fourteen of the twenty pages of petitioners' brief devoted to argument develop or are addressed to issues not raised on their petition to review. In their brief (p. 5) under the heading "Assignment of errors," petitioners set out five errors alleged to have been committed by the Commission. The first alleged error is as follows:

The hearing granted petitioners herein did not comply with the due process clause of the Constitution nor with the Administrative Practices Act.⁵

Petitioners argue this alleged error on pages 6-13 of their brief. This Assignment of Error is not covered by petitioners' Statements of Points and invokes into this review wholly new matter, requiring entirely different factual consideration and involving com-

³ By stipulation, approved by the Court, the Commission on the 6th day of January 1952 filed a designation (Tr. R. p. 139) of additional portions of the record to be printed. (See Supp. Tr. R. pp. 107-138.)

⁴ *Donnelley v. United States*, 276 U. S. 505, 511 (1928); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359, 369 (1927).

⁵ Undoubtedly petitioners are here referring to the Administrative Procedure Act.

pletely different principles of law from any of the points upon which petitioners stated they intended to rely.

In addition to the above Assignment of Error, petitioners argue additional new matters. On pages 13–16 of their brief, petitioners argue the negative of the question “Is the interstate shipment of punchboards a practice deemed undesirable by Congress?” and on pages 16–19, the negative of the question “Has the use of punchboards to distribute merchandise spread into line after line of merchandise?”. These questions are not only not within the field of petitioners’ Statement of Points, but they are not even within the scope of petitioners’ Assignment of Errors in their brief. Due to petitioners’ failure to include these matters in their Statements of Points, the printed transcript of record as it now stands before the Court is devoid of very material portions of the certified record which would clearly establish that petitioners’ argument in this respect is without merit.⁶

We have no quarrel with petitioners that they are entitled to a fair and impartial hearing under the due process clause of the Constitution; and that the hearings below must conform to the applicable provisions of the Administrative Procedure Act. We do contend, however, that this question is not properly before the Court on review. Lack of due process in the hearings below is not among the points upon which petitioners

⁶ Subparagraph 6 of Rule 19 of the Rules of this Court precludes petitioners from presenting and arguing these new matters in their brief. This Rule also declares that if any material portion of the certified record is not printed the Court, in its discretion, may dismiss the petition to review.

stated they intended to rely. Even if it had been, petitioners failed to comply with the applicable provisions of subparagraph 6 of Rule 19 of this Court's Rules, which requires petitioners to print *all* of the certified record material to the question under consideration. Those portions of the certified record will disclose that petitioners were fully apprised of all evidence relied upon and to be considered by the Commission, were accorded the full right to cross-examine all witnesses and to inspect all documents and exhibits, the right to a full opportunity to introduce evidence in rebuttal and the right to be heard. All of these elements of fair hearing constituting due process of law were accorded petitioners.

No one has a vested right to any given mode of procedure. *Gwin v. United States*, 184 U. S. 669, 674 (1902). And it is academic, requiring neither the citation of authority nor argument, that neither does any one have any right to introduce into the record incompetent, immaterial and irrelevant evidence. The issue raised below by the pleading was:

Is the sale and distribution in interstate commerce of punchboards and push cards designed and used for the sale and distribution of merchandise by a game of chance, gift enterprise, or lottery scheme an unfair act or practice within the intent and meaning of the Federal Trade Commission Act?

That was the sole and only issue. Petitioners attempted to introduce evidence in reference to:

(1) The type of people who patronize punchboards;

(2) The type of place where punchboards are displayed and operated;

(3) The reasons people have for punching punchboards;

(4) The type of merchandise distributed by punchboards;

(5) The effect of the use of punchboards on competition in the distribution of merchandise;

(6) That punchboards are not sales aids or stimulators of trade; and

(7) That punchboards are not popular.

Such testimony has nothing whatever to do with the above issue. It is wholly immaterial, irrelevant, and incompetent. The Trial Examiner struck this type of evidence from the hearings in Salt Lake City, Utah, held on May 17, to 22, 1945. On appeal to the Commission from the ruling of the Trial Examiner the Commission sustained the Trial Examiner.

Petitioners' contentions here are not based upon the order of the Commission sustaining the Trial Examiner's ruling in 1945 striking certain testimony but are based upon the order of the Commission denying the motion to set aside the Commission's order filed by petitioners in 1951. We submit, therefore, that the question of due process of law is not properly before this Court, but even if the Court should consider that it is, petitioners' violation of this Court's rule subjects their petition to review to an order of dismissal.

Since under Rule 19 of the Rules of Practice of this Court petitioners are estopped from now raising the issues argued in their brief at pages 6-19, and since petitioners do not in their brief question the Commission's findings of fact but confine their argu-

ment to the propositions that: (1) the interstate shipment of punchboards to be used to distribute merchandise is not within the purview of the Federal Trade Commission (Br. pp. 22-23); (2) the order issued herein is too broad (Br. pp. 23-24); and (3) this proceeding is not in the interest of the public (Br. pp. 24-25), we believe that for simplicity and clarity the questions actually presented can be stated as follows:

(1) Does the Federal Trade Commission have jurisdiction to prohibit the sale and distribution in interstate commerce of lottery devices designed and arranged for the purpose of enabling others to sell merchandise by means of a game of chance, gift enterprise, or lottery?

(2) Is the order to cease and desist too broad? and

(3) Is the proceeding in the public interest?

III

ARGUMENT

Preliminary statement

We sincerely regret that the time of a busy Court should be taken up with a petition to review that has so little to commend it. In view of the recent decisions of this Court in *Lichtenstein et al. v. Federal Trade Commission*, 194 F. 2d 607 (C. A. 9, 1952) and *Bork Manufacturing Co., Inc., et al. v. Federal Trade Commission*, 194 F. 2d 611 (C. A. 9, 1952), the petition to review in the instant matter (insofar as it questions the authority of the Commission to prohibit the sale and distribution in interstate commerce of lottery

devices used to sell merchandise by means of a game of chance, gift enterprise, or lottery scheme) is frivolous, wholly without merit, and completely devoid of substance.

The controversy in the instant case, as it was in those two cases, is concerned with the sale and distribution of lottery devices. Petitioners' brief here, as the briefs in those two cases, admits the sale and distribution in interstate commerce of such lottery devices and their use to distribute merchandise. The order in the instant matter is identical with the order issued in the *Bork* case and with the second part of the order issued in the *Lichtenstein* case.⁷

If ever there was a brief which on its face shows a desperate effort to find legal support for its contention, it is petitioners' brief here. The attorney for petitioners here also represented petitioners in the *Lichtenstein* and *Bork* cases before this Court. His brief in the instant matter is a miniature replica of his briefs in those cases. Finding no support among the authorities for his contention here, the attorney, just as in those briefs, contends that the decree of the Supreme Court in *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349 (1941) is controlling. In his brief here (pp. 20-23), just as in the *Lichtenstein* and *Bork* briefs, he questions the application of the principle of law laid down in *Federal Trade Commission v. Keppel & Bros., Inc.*, 291 U. S. 304 (1934), and takes issue with the decision of the Seventh Circuit in *Chas. A. Brewer & Sons v. Federal Trade Com-*

⁷ The Court modified the order in each of these cases by striking the words "or may be used."

mission, 158 F. 2d 74, and in addition thereto, in the instant brief, questions the correctness of the decision of this Court in the *Lichtenstein* and *Bork* cases, the decision of the Third Circuit in *Globe Cardboard Novelty Co., et al. v. Federal Trade Commission*, 192 F. 2d 444 (C. A. 3, 1952), and the decision of the Court of Appeals for the District of Columbia in *Hamilton Manufacturing Company v. Federal Trade Commission*, 194 F. 2d 346 (C. A. D. C. 1952), contending here as he did in the prior cases that the Federal Trade Commission Act is subject to the rule of strict construction, and therefore the word “using” appearing in the Federal Trade Commission Act cannot be construed to mean aiding, abetting, inducing, and procuring.

We cannot help but feel about the instant matter as the Third Circuit did about *Minter Bros. v. Federal Trade Commission*, 102 F. 2d 69 (C. A. 3, 1939)—a lottery case—where the Court, speaking through Circuit Judge Clark, at page 69, began its opinion with these words: “This seems to us a futile continuation of earlier litigation.” How exceedingly appropriate and applicable that observation is when, some 13 years after it was made, it is applied to this case. Petitioners’ counsel here, as he did in the *Lichtenstein* and *Bork* cases, relies on the same old discredited contentions that this Court and other Courts of Appeals have rejected. We could not help but wonder how many times this particular Court of Appeals, and how many other Courts of Appeals, must decide that it is in the public interest, and the Commission has authority, to prevent the interstate shipment of lottery

devices designed and used for the sale of merchandise by lottery, before it will finally dawn upon counsel that Courts of Appeals mean what they say and their decisions should not be ignored or lightly brushed aside and their time taken up by a rehashing of discredited and rejected theories.

1. The Federal Trade Commission has jurisdiction to prohibit the sale and distribution in interstate commerce of punchboards and push cards designed and sold for the purpose of enabling others to sell merchandise by means of a game of chance, gift enterprise, or lottery

The applicable law is well settled. The Federal Trade Commission has jurisdiction over practices in interstate commerce which are contrary to the public policy of the United States Government. *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U. S. 411, 453 (1922).

The sale of merchandise by means of a game of chance, gift enterprise, or lottery scheme is contrary to the public policy of the United States Government. *Federal Trade Commission v. R. F. Keppel & Bros., Inc.*, 291 U. S. 304, 313 (1934).

It is likewise well settled that to supply another with a means of violating the Federal Trade Commission Act is also a violation of the Act. *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U. S. 483, 494 (1922). This principle has repeatedly been applied to cases in which the medium supplied was a lottery device. *Lichtenstein, et al. v. Federal Trade Commission*, 194 F. 2d 607 (C. A. 9, 1952); *Bork Manufacturing Co., Inc., et al. v. Federal Trade Commission*, 194 F. 2d 611 (C. A. 9, 1952); *Hamilton Manufacturing Company v. Federal Trade Commis-*

sion, 194 F. 2d 346 (C. A. D. C., 1952); *Globe Cardboard Novelty Co. v. Federal Trade Commission*, 192 F. 2d 444 (C. A. 3, 1951); *Chas. A. Brewer & Sons v. Federal Trade Commission*, 158 F. 2d 74 (C. A. 6, 1946); *Modernistic Candies, Inc. v. Federal Trade Commission*, 145 F. 2d 454, 455 (C. A. 7, 1944).

Petitioners' contention here (Br. pp. 22-23) is that the Federal Trade Commission Act limits the Commission's power to the use of unfair methods of competition and unfair or deceptive acts or practices in commerce. This is one statement in petitioners' brief in which we concur. However, petitioners then go on to argue that the decision of the Courts in the *Brewer*, *Globe*, and *Hamilton* cases and this Court's decision in the *Lichtenstein* and *Bork* cases were based upon the theory that the Commission has the power to "stop anyone who aids, abets, induces or procures others to violate the Act"; that such a theory is not permissible under the rule of strict construction which must be applied to the Federal Trade Commission Act. There is no merit whatever to this, and petitioners cite no authority in support thereof because there is none.

A complete reply to petitioners' argument here, if any is necessary, is that this same argument was made in the *Lichtenstein* and *Bork* cases and rejected by this Court.⁸ Speaking through Chief Judge Denman, the Court said:

Upon a review of the history of Section 5 (a) in connection with the decisions of the Court thereon, we are of the opinion that the petitioner's use of interstate commerce to ship these

⁸ See also cases cited, *supra*, pp. 12-13.

devices to be used in intrastate commerce in the gambling disposition of merchandise to the ultimate consumer is one of the “unfair * * * practices in commerce” subject to the preventive control of the Commission.

We therefore submit that the Commission does have jurisdiction over the interstate shipment of lottery devices, such as are here involved and in the proper case to issue its order prohibiting such shipment.

2. The Commission's order to cease and desist is not too broad

Relying on the decision of the Supreme Court in *Federal Trade Commission v. Bunte Bros., Inc.*, 312 U. S. 349 (1941), petitioners next contend (Br. p. 23) that the order to cease and desist is too broad and should be modified so as to prohibit the shipment of lottery devices to those “who use them in a manner which violates the Federal Trade Commission Act” and should not prohibit shipment to those who use them in the intrastate sale of merchandise. There is no merit to this and the *Bunte* case is not applicable. The *Bunte* case involves transactions that were wholly in intrastate commerce. The instant matter is concerned with transactions wholly in interstate commerce. The complaint neither charged, nor does the order prohibit, intrastate shipment of lottery devices. The order merely prohibits their shipment in interstate commerce. This same contention was made before this Court in the *Lichtenstein* and *Bork* cases and the Court rejected it by affirming the Commission's order.

The petitioners next state (Br., p. 24) that the words “or may be used” should be deleted from the

order to cease and desist. This same contention was made in the *Lichtenstein* and *Bork* cases. The Court agreed, and, speaking through Chief Judge Denman, in the *Lichtenstein* case, said:

Petitioner further contends that if we hold the Commission's second order to be valid, the phrase, "or may be used," should be stricken from it. We agree.

The Court then went on to say that the issue was confined to lottery devices "the 'only' use to be made of which was to enable the ultimate purchasers to sell or distribute other merchandise," citing in two footnotes the allegation in the complaint and the findings of the Commission in reference thereto.

The complaint in the instant matter contains a similar allegation and the Commission's findings of fact contain a similar finding. However, the instant case, we believe, can be distinguished factually from the *Lichtenstein* and *Bork* cases to an extent that the Court would be justified in affirming the instant order without the deletion requested.

We respectfully call the Court's attention to the testimony of F. W. James, a specialist in the punch board business, now appearing as counsel for petitioners in the instant matter (see Tr. R., pp. 66-68, and Supp. Tr., pp. 130-138). Mr. James testified in substance that some of the boards distributed by petitioners in interstate commerce are known as "Examination Game" and "Checker" boards; that a book of answers is distributed with the "Examination Game" board and a sticker, that can be pasted on the back of the board, is also distributed with petitioners'

board—the sticker has printed thereon a checkerboard with numbers appearing on the black spaces, ten checker problems, and other printed instructions.

Mr. James further testified that when the punch board is used as an “Examination Game,” the person punches the board and on the back of the ticket punched appears a question with a number and the number thereon refers to the answer in the book of answers; that when used as a checkerboard, the number appearing on the ticket punched refers to a problem of checkers appearing on the back of the board; that if a correct answer is given to the question or a correct solution made of the checker problem, a prize is awarded.

Mr. James further testified that a salesman representing Chas. Brewer & Sons had a patent on this type of boards and that during the life of these patents he, Mr. James, was not able to use the boards very extensively because every time he attempted to do so he was threatened with a suit. He stated that since the patent had expired and since Chas. Brewer & Sons had gone out of business,⁹ “I have worked on a big, what I would call a big, or broad campaign that industry is going to establish as soon as conditions get back somewhere near normal whereby there will be all through the United States the using of the boards according to the running of the contests and examinations” (Tr. R., pp. 130–131). He further stated

⁹ The Commission issued a cease and desist order against Chas. A. Brewer & Sons prohibiting them from the interstate shipment of lottery devices. When the order of the Commission was affirmed (see 158 F. 2d 74), this concern went out of business.

“Well, we have as I said a program all ready now to start, now that the patent has expired throughout the U. S., which will be used by all the companies where heretofore it was confined to Charles A. Brewer and Sons, that is, practically. You see, Brewer uses the checker idea all over the U. S., as I understand it, * * *” (Supp. Tr. R., p. 132).

When Mr. James was asked if he knew how many of the “Examination Game” and “Checker” boards were distributed by petitioners, he replied that he did not know. He was also asked if he knew how many of the checker stickers were affixed to petitioners’ boards and he stated, “I don’t think they have ever affixed any. I don’t know of the company itself ever affixing any of those checker problems to the boards” (Supp. Tr. R. p. 133).

Mr. James further stated that he did not know the approximate number of checker stickers distributed with petitioners’ boards. He also said that he did not know how many of the answer books were distributed by petitioners with their boards and that he did not know how many of these books were actually used by petitioners’ customers.

He stated that he thought all of petitioners’ boards except the money boards contained the question feature on the punch tabs (Tr. R. p. 77). Mr. James, counsel for petitioners, tells the Court in his brief (p. 24): “All of petitioners’ boards are numerically keyed to an answer book. Every ticket in every board has printed upon it a question and a book containing the correct answer to each question is furnished. * * *”

That "Coming events cast their shadows before them" is illustrated by the testimony of Mr. James. He has warned the Commission and advised this Court that the punchboard industry intends to flood this country with a so-called new type of punchboard—such as is used by the petitioners in the instant case—assertedly designed to be used for educational purposes. By his testimony, he would have the Court to believe that the punchboard industry has reformed and is no longer interested in the manufacture and sale of punchboards designed and used to distribute merchandise by a game of chance, gift enterprise, or lottery scheme. That, on the contrary, it is now interested in a broad program of education, a program that will encourage the individual to become a seeker after knowledge, so that he will be able to answer such questions as: "What is the Japanese population of the United States?" (Tr. R. p. 68); or, if he so desires, become an expert in solving various checker problems. These so-called educational and checker punchboards are but another in the long line of subterfuges used in attempting to evade prohibitions against lotteries in the distribution of merchandise. The original punchboard was designed, manufactured, and sold solely for the purpose of selling and distributing merchandise by lottery. It was known as a merchandise board—later on the same board or type of board was used for gambling—instead of obtaining merchandise for a prize, the puncher, if lucky, obtained a certain sum of money. The punchboard today is of exactly the same basic design. It has not changed, except to-

day it is better constructed and perhaps has more "eye appeal." All of the punchboards from the first ones to those in use today are constructed with varying numbers of holes in which are concealed slips of paper having thereon numbers and, the most recent ones also having thereon other printed matter. You may call these boards what you will, they are all of the same basic design, and that design came into existence for the sole purpose of supplying a means which would enable one to distribute merchandise by lottery. Regardless of what they are called they are basically and inherently a merchandise board and "may be used" for selling merchandise by lottery—even the so-called money boards may be used to distribute merchandise. Every witness, customers of petitioners, who testified in this case, except petitioners' expert and counsel, Mr. James, stated that petitioners' boards were used for the purpose of selling merchandise to the public by lottery and that they did not know of any other manner in which they were used (Supp. Tr. R. pp. 107-130). It is obvious, therefore, that petitioners' punchboards, though numerically keyed to an answer book or a checker problem, nevertheless represent another attempt of this industry to evade the impact of the decisions of the Courts of Appeals in lottery cases.

State courts have often commented upon the ingenuity with which those who seek to profit by developing the gambling instinct of the public attempt to elude the laws against gambling. Indeed, "No sooner is a lottery defined * * * than ingenuity is at work to evolve some scheme of evasion which is within

the mischief, but not quite within the letter, of the definition.” *State v. Lipkin*, 169 N. C. 265, 84 S. E. 340, 343 (1915). The constant aim of those who live by promoting lottery schemes is “to streamline the plan with a view of concealing by name and technical operation and other fallacious pretenses one or more of the elements necessary to make it a lottery, gift enterprise, or game of chance.” *State v. Omaha Motion Picture Exhibitors Assn.*, 139 Neb. 312, 297 N. W. 547, 550 (1941). “In no field of reprehensible endeavor has the ingenuity of man been more exerted than in the invention of devices to comply with the letter, but to do violence to the spirit and thwart the beneficent objects and purposes of laws designed to suppress the vice of gambling. Be it said to the credit of the expounders of the law that such fruits of inventive genius have been allowed by the Courts to accomplish no greater result than that of demonstrating the inaccuracy and insufficiency of some of the old definitions of gambling. * * * [*State v. Joynt*, 341 Mo. 788, 110 S. W. 2d 737, 740 (1937), following *City of Moberly v. Deskin*, 169 Mo. App. 672, 155 S. W. 842, 844 (1943)].”

It has been recognized that Commission orders to cease and desist are “necessarily” general—*Chamber of Commerce of Minneapolis v. Federal Trade Commission*, 13 F. 2d 673, 696 (C. A. 8, 1926)—because of the “impossibility of anticipating and mentioning every illegal variation” of proscribed conduct. *Oppenheim, Obendorf & Co. v. Federal Trade Commission*, 5 F. 2d 574, 575 (C. A. 4, 1925). And “possible un-

certainty of application in isolated instances” affords no basis for setting aside or modifying an order “otherwise valid and practical of operation,” *Georgia Public Service Commission v. United States*, 283 U. S. 765, 772 (1931).

Further than this, the determination of the type of order necessary to protect the public from business practices similar to those of petitioners rests within the sound discretion of the Commission and the Courts will not disturb the Commission’s orders unless they exceed the scope of the complaint or are on their face an abuse of discretion. The Supreme Court has frequently emphasized “the scope that must be allowed to the discretion and informed judgment of an expert administrative body.” *Federal Security Administrator v. Quaker Oats Co.*, 318 U. S. 218, 227–228 (1943). The Supreme Court has also declared that the Federal Trade Commission was created with the “avowed purpose of lodging the administrative functions committed to it” in the body of experts “especially competent to deal with them.” *Federal Trade Commission v. R. F. Keppel & Bros., Inc.*, 291 U. S. 304, 314 (1934). It is “not in the province of the Court to absorb the administrative functions to such extent that the executive or legislative agencies become mere fact-finding bodies.” *Gray v. Powell Co.*, 314 U. S. 402, 412 (1941).

Petitioners request this Court to modify the order here to the same extent and in like manner as the Court modified the orders in the *Lichtenstein* and *Bork* cases. In answering this request in the *Lichten-*

stein and *Bork* cases, we relied mainly on the fact that those cases could be easily distinguished from a former case before this Court in which the Commission's order was modified in the manner requested; namely, *Lee Boyer's Candy v. Federal Trade Commission*, 128 F. 2d 261 (C. A. 9, 1942). The *Lee Boyer's* case was concerned with the shipment of candy packaged with lottery devices. The *Lichtenstein* and *Bork* cases involved only the shipment of the lottery devices, no merchandise being sold therewith. This Court modified the order in the *Lee Boyer's* case because the words "or may be used" might be construed to prevent the shipment of straight candy by petitioner, the reasoning being that the straight candy might be used in some lottery scheme. Although this Court, in modifying the orders in the *Lichtenstein* and *Bork* cases cited the *Lee Boyer's Candy* case in support thereof, the opinion of the Court in the *Lichtenstein* case indicated a different reason as a basis for the modification there made than that given in the *Lee Boyer's* case. This Court indicated that it based its action in the *Lichtenstein* case on the allegation in the complaint that the "only" use to be made of the punchboards involved was to enable the ultimate purchaser to sell merchandise and that the findings on this allegation distinguished those boards from so-called money boards used solely for gambling. In its opinion, the Court said "We are not here confronted with a case where the petitioners were called upon to meet a tendered issue of punchboard and push-card devices which 'may be used' in the sale of merchandise." It

therefore appears that the Court subjected the pleadings in that case and the findings of the Commission thereon to a strict and limited construction.

It is well settled that administrative agencies such as the Federal Trade Commission are not strictly bound by the technical rules of pleading and rigid rules of evidence. *Federal Trade Commission v. Cement Institute et al.*, 333 U. S. 683, 694 (1948). "Pleadings before the Commission are not required to meet the standards of pleadings in a Court where issues are attempted to be framed with a measure of exactness which is designed to limit the broad sweep of investigation which characterizes the proceedings of administrative bodies." *A. E. Staley Mfg. Co. et al. v. Federal Trade Commission*, 135 F. 2d 453 (1943).

It is also settled that variance between the order and the complaint of an administrative agency is not fatal unless such variance constitutes an entire abandonment of the very substance of the dispute and the substitution of another which the defendant could not anticipate and which they had no opportunity to meet. *Armand Co., Inc., et al. v. Federal Trade Commission*, 84 F. 2d 973 (C. A. 2, 1936).

The mere fact that the order is somewhat broader than the technical allegations in the complaint is of little consequence so long as the order does not encompass or include in its prohibition matters entirely foreign to the substance of the dispute to which petitioners were summoned and which petitioners, therefore, could not have anticipated and had no oppor-

tunity to meet. Surely a prohibition against the sale of punchboards that "may be used" cannot be characterized as including or substituting entirely different matter foreign to the disputed issue raised. That this proceeding cannot be so characterized is amply borne out by the fact that petitioners anticipated such an order and attempted to meet it by the testimony of their expert, Mr. James. Petitioners injected into this controversy the subject matter of boards that "may be used" as distinguished from boards that are actually used or only used for the sale of merchandise by lottery.

The Supreme Court has also said that, in determining the propriety of a Federal Trade Commission order, great weight is given to the Commission's conclusions as being the result of expertness coming from experience. In view of the Commission's familiarity with the problem here presented, and, further, in view of the continued subterfuges which have been resorted to, the Court should not lightly modify the Commission's order made in an effort to close the channels of interstate commerce to this gambling industry which makes use of it to violate the public policy of the Government against sale of merchandise by gambling. *Federal Trade Commission v. Cement Institute et al.*, 333 U. S. 683 (1948), rehearing denied (1948).

In proceedings of this nature, the power of the Court is not administrative but judicial. "The range of issues open to it is narrow. Only questions affecting constitutional power, statutory authority, and the

basic prerequisites of proof can be raised.” If these legal tests are satisfied, the Commission’s order becomes incontestable, and “judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.” *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 139–140, 146 (1939); *Dobson v. Commissioner of Internal Revenue*, 320 U. S. 429, 501 (1943).

The “relation of remedy to policy,” the Supreme Court has declared, “is peculiarly a matter for administrative competence” (*Phelps-Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177), and the Courts will neither “substitute their own judgment” for that of an administrative agency, *Federal Security Administrator v. Quaker Oats Co.*, 318 U. S. 218, 227 (1943), nor undertake to advise an agency “how to discharge its functions.” *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 617–618 (1944).

In the circumstances we respectfully submit that based upon the testimony of Mr. James, together with the testimony of the witnesses who purchased petitioners’ board, the Commission was fully warranted in entering an order broad enough not only to prohibit the sale of punchboards that are used and only used for the purpose of selling merchandise by lottery but also to include a prohibition against petitioners’ boards which the evidence shows, due to their design, may be used for that purpose. The Commission is not required by law to limit its order to prohibit the

interstate distribution of punchboards that are used and only used for the sale of merchandise. To be of any value the order must also proscribe the distribution of boards which, due to their design, may be used for the purpose. For, as the Supreme Court said in *National Labor Relations Board v. Express Publishing Co.*, 312 U. S. 426, at pp. 435-436, it is

a salutary principle that when one had been found to have committed acts in violation of the law he may be restrained from committing other related unlawful acts.

And at pp. 436-437, the Court said:

Having found the acts which constitute the unfair labor practice, the Board is free to restrain the practice and other like or related unlawful acts. * * * The breadth of the order, like the injunction of the court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past.

The Commission's order here does no more than just that. It is broad enough to accomplish the purpose for which the proceedings against petitioners were instituted; namely, the prohibition against shipping lottery devices in interstate commerce that are to be used or which due to their design are suitable for use to sell merchandise in violation of the public policy of the United States Government against the sale of merchandise by lottery.

3. The proceeding is in the public interest

Petitioners' contention under this point is so obviously frivolous that we shall not dignify it with a reply except to state that petitioner in the *Lichtenstein* case made the same contention and this Court, speaking through Chief Judge Denman, in rejecting such contention said:

Petitioner further urges that the prevention of the use of its gambling devices in the sale of merchandise to the ultimate consumer is not in the public interest. We find no merit in this contention. The language of the Supreme Court in *Phalen v. Virginia*, 49 U. S. 163 (1850), as to the "pestilence" of lotteries which "enters every dwelling * * * reaches every class * * * and preys upon" and "plunders the ignorant and simple" applies with force many times multiplied to the spread of lottery methods into line after line of merchandise.

IV

CONCLUSION

We therefore respectfully submit that there is no merit whatever to petitioners' contention here and that the order to cease and desist was properly entered. The Commission therefore prays that the petition to review be dismissed, that pursuant to the statute¹⁰ the Court enter its decree affirming the Com-

¹⁰ "To the extent that the order of the Commission is affirmed, the Court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." Federal Trade Commission Act, § 5 (c) ; 52 Stat. 113 ; 15 U. S. C. § 45 (c).

mission's order and commanding petitioners to obey and comply therewith.

Respectfully submitted.

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AUGUST 1952.

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 13011

REPLY BRIEF FOR PETITIONERS.

BERNICE FEITLER and IRWIN FEITLER,
Individually and Trading as
Gardner & Company,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION TO REVIEW AN ORDER OF
THE FEDERAL TRADE COMMISSION

PETITIONERS' ASSIGNMENT OF ERROR THAT "THE HEARING GRANTED PETITIONERS HEREIN DID NOT COMPLY WITH THE DUE PROCESS CLAUSE OF THE CONSTITUTION NOR WITH THE ADMINISTRATIVE PRACTICES ACT" IS PROPERLY RAISED BY THE PETITIONERS' STATEMENT OF POINT.

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PETITIONERS' ASSIGNMENT OF ERROR THAT "THE HEARING GRANTED PETITIONERS HEREIN DID NOT COMPLY WITH THE DUE PROCESS CLAUSE OF THE CONSTITUTION NOR WITH THE ADMINISTRATIVE PRACTICES ACT" IS PROPERLY RAISED BY THE PETITIONERS' STATEMENT OF POINTS.

There is no merit to the Commission's contention that the petitioners' assignment of error that "they did not have a fair hearing" is not properly raised by the statement of points. This assignment of error comes clearly and squarely within petitioners' statement of point No. 8 which is as follows (Tr. 93)

“The Commission erred in denying petitioners’ motion, filed July 5th, 1951, to set aside the said order.”

This statement of point properly raises this assignment of error because the first and main point relied upon by the petitioners to sustain this motion is “that by virtue of the following ruling made and adhered to herein by the Trial Examiner respondents (petitioners here) were not given a fair and an impartial hearing.” (Tr. 33)

To show that this assignment is properly raised by the statement of points we quote the following from the said motion which appears on page 33 of the printed record:

“The following discussion is a presentation of the reasons and facts upon which the respondents rely to substantiate this motion. Respondents’ first contention is that by virtue of the following ruling made and adhered to herein by the Trial Examiner respondents were not given a fair and an impartial hearing. The ruling is as follows:”

It is fundamental that when the denying of a motion is set out as one of the “statement of points” any and every point relied upon in support of the motion is a proper assignment of error. Under the circumstances of this case, there is no basis upon which the Commission’s claim that “This assignment of error calls for new matter, requiring entirely different factual consideration and involving completely different principles of law from any of the points upon which petitioners stated they intend to rely.” (Brief page 5).

As statement of fact No. 8 is based upon the denying of the motion which motion in turn is based upon the ground that the hearing granted the petitioners was not a fair and impartial hearing, it is self evident that if the assignment of error read “The Commission erred in denying

petitioners' motion" the argument under this wording would be identical with the argument under the assignment as it is worded. In other words, the statement of point No. 8 gave ample notice to the Commission that petitioners would present to this court the proposition that their constitutional right of due process had been violated.

In addition, the following will show that the Commission was adequately advised that the petitioners would present to this Court the contention that their constitutional right of due process had been violated. The Commission's order in denying said motion. (Tr. R. 62) shows that the petitioners presented in both the brief and oral argument submitted to and argued before the Commissioners the proposition that the hearing granted them violated the due process clause. Petitioners, realizing that the brief filed with the Commissioners and the oral argument before them would not be a part of the record herein, filed the said motion July 5th in order to have it appear affirmatively in the record that this point and contention had been submitted squarely and specifically to the Commissioners and that they had ruled adversely upon it.

The Commission admits in its brief that this contention is based upon the Commission's order denying petitioners' said motion. We quote from page 8 of respondents' brief:

"Petitioners' contentions here * * * are based upon the order of the Commission denying the motion to set aside the Commission's order filed by petitioners in 1951."

As the Commission admits that this contention is based upon the order denying the motion and as petitioners' statement of point No. 8 is that Commission erred in denying the motion, it is self evident that the question of due

process of law is properly raised by the statement of points.

The Printed Record Contains Sufficient Parts of the Record to Present Every Point Argued by Petitioners.

The Commission makes the further contention that the printed record does not contain enough of the record to present this contention. There is no merit to this contention because every essential part of the record necessary to the presentation of this contention is a part of the printed record. In this contention the Commission has a misunderstanding of petitioners' position. The petitioners are not relying upon any particular ruling denying the admission of evidence or the striking of any evidence; their complaint is based upon the fact that they continuously during the periods in which the hearings were conducted asked for hearings to be set at certain places and that each time such requests were presented the Trial Examiner denied the request and refused to grant hearings except in places wherein the Commission had held hearings and continued to rule that the only evidence that he would permit the petitioners to introduce would be evidence which tended to disprove the evidence introduced by the Commission. The printed record contains all of the evidence and parts of the record bearing upon this point.

It is admitted by the Commission in its brief p. 7 that the petitioners are entitled to a hearing in which they have the "*right to a full opportunity to introduce evidence in rebuttal and the right to be heard.*" In addition to this admission by the Commission, the administrative procedure act provides that the hearing granted must be such that the petitioners are given a full and complete opportunity to introduce their evidence so that there is a complete and full disclosure of the facts,

Petitioners' point is that by virtue of the Trial Examiner confining the hearing exclusively to places and locations wherein the Commission held hearings and ruling that the only evidence admissible is evidence that would tend to disprove the Commission's evidence, the petitioners were not granted the opportunity to introduce evidence in rebuttal and also that the petitioners were not allowed the opportunity to introduce their evidence so that there would be a full and complete disclosure of the facts.

In addition the Commission contends that petitioners' discussion on page 13 of their brief that, "The interstate shipment of punch boards is not a practice deemed undesirable by Congress" is a point which is not raised by either the assignments of error or the statement of points. The Commission is in error in this contention because the discussion is not of any point other than a point raised in a cited case. In other words, the petitioners are only discussing a statement made in the *Lichtenstein* Case to show that that case is not applicable to the present case, therefore, it is not a point that must be raised by assignment of error or statement of point. The same is true of petitioners' argument commencing on page 16. This last point is also presented on the basis that if the petitioners were allowed to introduce their evidence said evidence would disprove a premise upon which this Court in the *Lichtenstein* case predicated that decision.

All that is necessary to be in the record to raise these points is the fact that the Examiner made this ruling, the request made by the petitioners for hearings and the ruling showing that the hearings were confined to the places wherein the Commission held hearings, all of which is contained in the printed record. Therefore, there is no merit to the Commission's contention that the petitioners did not comply with rule 19 of this court's rules.

In concluding this contention it is self evident from the above, that the question of due process of law is properly before this court.

The Facts Which Petitioners' Proffered Evidence Would Establish Are Material, Competent and Relevant to the Issues Herein.

The Commission makes the contention that granting that this point is properly before the court, that there is no merit to the contention because first the facts which petitioners wish to prove are incompetent, irrelevant and immaterial to the issues involved herein, and the further contention that this case is controlled by the case of *Charles A. Brewer & Sons v. F.T.C.*, 158 F. 2d 74 (C.A. 6, 1946); and the case of *Lichtenstein, et al. v. F.T.C.*, 194 F. 2d 607 (C.A. 9, 1952). The following discussion will establish that the Commission's contention that the facts which the petitioners wish to establish by their proffered evidence are incompetent, irrelevant and immaterial is contrary to and in direct conflict with the *Brewer* and the *Lichtenstein* Cases.

Let us first discuss the *Brewer* Case to show that this contention of the Commission is in conflict with this case. The Sixth Circuit Court in the *Brewer* Case set out the following:

“In its findings, the Commission asserted that many retail dealers do not make use of lotteries or games of chance in the sale or distribution of merchandise, and that many manufacturers of and wholesale dealers in merchandise do not supply to their retailers the means of conducting lotteries. In consequence of the popular appeal of games of chance, much trade is diverted from these dealers, manufacturers and wholesalers, to competitors who do not supply such lotteries or games of chance.

The final finding of the Federal Trade Commission stated: 'The practice of respondents (petitioners here) in selling and distributing their lottery devices thus serves to place in the hands of others means and instrumentalities whereby they are enabled to use unfair methods of competition and thereby unfairly to divert substantial trade to themselves from those who do not use such methods.' "

The Court further says,

"In our view, all the findings of fact of the Federal Trade Commission are supported by evidence, disclosed in the record."

To emphasize the importance of having the Commission make the above findings, and that the findings are adequately supported by the evidence, the Court in a footnote sets out portions of the evidence.

From the above it is beyond controversy that the *Brewer* Case held that the Commission has the burden to prove by competent, relevant and material evidence the facts as herein above set out; the converse of which is that the petitioners have the right to disprove these facts. On this point the Commission admits that the proffered evidence is competent, relevant and material to sustain the facts but its contention is that the facts are immaterial; on this point on page 9 of its brief the Commission said:

"We believe that for simplicity and clarity the questions actually presented can be stated as follows:

(1) Does the Federal Trade Commission have jurisdiction to prohibit the sale and distribution in interstate commerce of lottery devices designed and arranged for the purpose of enabling others to sell merchandise by means of a game of chance, gift enterprise, or lottery?"

In contrast to this contention the petitioners contend, as the following argument will show, that that the law on

this point as announced by the *Keppel* and *Brewer* Cases is, the Commission has power to issue a Cease and Desist Order to restrain the aiding and abetting, inducing and procuring manufacturers and wholesale and retail dealers in merchandise to use unfair and deceptive acts and practices and unfair methods of competition and that the only cases wherein the use of punch boards constitutes such unfairness are cases wherein the "*evidence*" establishes the facts that the said use of the said punch boards places "*competitors in a position where they are compelled to adopt a method which they are under a powerful moral compulsion not to adopt or lose a substantial volume of business.*" Therefore, the petitioners' contention is that this contention made by the Commission is contrary to the holding in the *Brewer* Case. The *Brewer* Case holds definitely and unequivocally that before the Commission has power or authority to prohibit the interstate shipment of lottery devices the Commission must establish, as we have set out above, the facts which the Court enumerated in its opinion; as we have said, the converse is that if the petitioners can prove that such facts do not exist the Commission has no authority or jurisdiction to restrain the petitioners from shipping their punch boards in interstate commerce.

In this connection it is fundamental that the petitioners are not bound by any findings the Commission made in the *Brewer* Case; they have a constitutional right to introduce their evidence to establish the essential facts before the fact finding body. It is further fundamental that as to facts, the Commission nor a court has no power to settle the facts in a case as a matter of law thereby depriving other litigants from the right to introduce evidence to show that the facts in their case are different than what

the Commission has previously ruled in a case wherein the evidence was entirely different than that which the petitioners wish to introduce. In other words, the facts set out in the footnote in the *Brewer* case are based upon an advertisement and are absolutely ridiculous; the petitioners' testimony will prove that there is absolutely not an iota of truth in any one of them. It would be outrageous to hold that these petitioners are bound by some silly assinine advertisement issued by Brewer. In other words to hold in this case that the *Brewer* case holds that the only point at issue herein is, that the Commission has power to prevent "the distribution in interstate commerce of lottery devices which are to be used in the intrastate distribution of merchandise," would amount to holding that these petitioners are bound by the evidence introduced in the *Brewer* Case which includes the said advertisement. The injustice of such a ruling is made apparent by the fact that Brewer did not raise the question or introduce evidence on the point that the petitioners are now presenting; that is, it would be an injustice to hold that the petitioners are now precluded from proving certain facts because Brewer did not see fit to introduce evidence to establish the facts which the petitioners wish to prove.

In discussing the *Lichtenstein* Case, the petitioners assume that the decision by this Court therein is based upon the proposition that before the Commission would have jurisdiction to issue a Cease and Desist Order, as the one issued herein, it must appear by competent, relevant and material evidence that the intrastate use of punch boards to distribute merchandise is a pestilence *entering every dwelling, reaching every class, preying upon and plundering the ignorant and simple and is spreading into line after line of merchandising.*"

In the *Lichtenstein* Case this Court relied upon public law 906, 81st. Cong. 2d Sess., approved January 2nd, 1951. Before the application of this law is applied to a case it is very important that the case comes clearly, strictly and unequivocally within the holding in the *Brewer* Case. In order to bring a case within the holding of the *Brewer* Case so that public law 906 and the comments incident thereto have any bearing upon it the case must be one in which the Commission has made findings based upon competent, material and relevant evidence that the intra-state use of punch boards to distribute merchandise “*In consequence of the popular appeal of games of chance, much trade is diverted from these dealers, manufacturers and wholesalers, to competitors who do not supply such lotteries or games of chance*” and all of the other facts set out in the *Brewer* Case. The necessity of such proof before the case can be controlled by an application of public law 906 is self evident because Congress certainly would not be interested in stopping the shipment of punch boards in interstate commerce if their use did not amount to unfair methods of competition or unfair acts or practices. It is also fundamental that the provision of said statute and the referred to comments in the enactment thereof pertain only to cases that come strictly within the *Brewer* Case.

The remarks and reference to the *Brewer* and *Keppel* cases in public law 906 are limited strictly to cases wherein the evidence, after the parties to the proceedings have been afforded a full and complete opportunity to introduce their evidence, establishes the fact that the use of punch boards is an unfair act or practice or an unfair method of competition. Congress in reference to these two cases was of the opinion that the holdings in these cases are confined, as we have set out above, to cases wherein

the furnishing of the punch boards is aiding, abetting, inducing and procuring others to use unfair methods of competition or unfair acts and practices; further, Congress by such reference did not intend to imply that the Commission could stop the interstate shipment of punch boards to people who in turn did not use them to engage in unfair methods of competition or unfair acts and practices; in other words, it is certain that Congress understood that the two cases referred to hold that the order therein prohibited only the interstate shipment of punch boards which in turn were used by people in such a manner that competitors of said persons were placed in the position where they were compelled to use punch boards or lose a substantial volume of business.

Before leaving a discussion of public law 906 let us make the following comment. The fact that Congress, after due consideration concerning the Commission's jurisdiction over punch boards, did not include within the act a prohibition of the interstate shipment of them is conclusive that Congress did not intend and this Court in the *Lichtenstein* Case held that the Commission does not have power to prohibit the interstate shipment of punch boards on the sole ground that they are lottery devices.

Therefore the facts which the petitioners wish to establish by their proffered testimony are clearly competent, relevant and material. This being true, the Commission's refusal to allow them to prove these facts certainly deprived them of their constitutional right of due process of law.

In this connection with the strictness in the application of Public Law 906 it is well to call the Court's attention to that which the United States Supreme Court had to say in

this regard in the Case of *Reilly, Postmaster v. Pinkus*, 338 U. S. 269 at 277:

“It is not amiss to point out that the Federal Trade Commission does have authority to issue cease-and-desist orders in cases like this without findings of fraud. * * * But that remedy does not approach the severity of a mail fraud order. In *Federal Trade Commission v. Raladam Co.*, 316 U. S. 149, for instance, a business advertising its anti-fat product with extravagant statements similar in many respects to those the respondent here was ordered to cease and desist from making such statements. Except for this, the business was left free to sell its product as before. Unlike the Postmaster General, the Federal Trade Commission cannot bar an offender from using the mails, an order which could wholly destroy a business. * * * The strikingly different consequences of the orders issued by the two agencies on the basis of analogous misrepresentations emphasize the importance of limiting Post-office Department orders to instances where actual fraud is clearly proved.”

The order in the case at bar does exactly that which the Supreme Court says the Commission cannot do; the Commission's order bars the petitioners from using the mails and all other forms of interstate transportation to distribute their punch boards in interstate commerce and in addition the order also wholly destroys their business. As is pointed out by the Supreme Court, there is a marked difference between cases wherein, as in the *Raladam* Case, the order simply restrains the use of some unfair method or act leaving the business free to sell its product as before and cases wherein the order restrains the selling of the product, as it does in the case at bar, thereby wholly destroying the business. The purpose of citing the above case at this point is to establish that the Supreme Court has laid down the following two principles of law; the first

of which is, that before a court will sustain an administrative order which is so severe that the order could wholly destroy a business, as it does in the case at bar, the very strictest interpretation and application of all principles of law and rules of statutory construction must be adhered to; the second one of these principles is that the Supreme Court has held that the Commission cannot issue an order which could wholly destroy a business. Bearing in mind these two principles, let us emphasize the importance of the holding in the *Brewer Case* that the findings of fact as set out therein are absolutely essential to sustain a cease and desist order and the further holding that such facts are subject to proof to the extent that the Commission must introduce enough competent, relevant and material evidence to sustain such findings and the petitioners must be granted a full and complete opportunity to introduce their evidence to show facts which will negative such findings, so that if the Commission should insist upon making such finding the petitioners could present to a court the proposition that such findings are not supported by the evidence.

The Contention That The Findings Are Supported by the Evidence Is Out of Order in this Case because the Petitioners Were Not Granted A Fair and Impartial Hearing.

The Commission makes the statement that the petitioners are not now contending that the findings herein are not supported by the evidence. We have two comments to make on this contention. The first one is that it impliedly admits that such findings are essential and that they are subject to proof. The second comment is that at one time, as will be seen from our statement of point, petitioners were going to raise this question. However, upon further consideration petitioners came to the conclusion

that such a contention is not to be presented to a court until the petitioners have been granted the opportunity to introduce their rebuttal evidence. In other words, the Commission has no ground to contend that the findings are supported by evidence until the petitioners have had a full opportunity to introduce and make a part of the record the evidence bearing upon these findings. It is fundamental that the question of the sufficiency of the evidence to support findings is not a question to be presented until it is established that the hearing granted complied completely and strictly with due process of law and the administrative procedure act. Therefore, petitioners contend that the Commission's statement that the petitioners do not raise the question that the findings are not supported by the evidence is clearly out of order.

Commission's Plea for Additional Jurisdiction Is Based Upon an Erroneous Assumption.

In addition it seems to the petitioners that the Commission's condemnation of the use of punch boards to distribute merchandise in intrastate commerce is based upon an erroneous assumption by the Commission that such transactions are of such a magnitude that this court should go to great length in granting the Commission power to stop this type of transaction. All that the Commission says on this point is steeped in irony. This statement is based upon the facts that the Commission refused to allow the petitioners to introduce evidence concerning these transactions which evidence petitioners contend will establish beyond all doubt that the said transactions are not of the nature or type to constitute them unfair methods of competition or unfair acts and practices within the meaning and intent of the F.T.C. Act.

This emotional appeal made by the Commission is certainly based upon an assumption which assumption the

petitioners' evidence would show is false and unfounded. From this it is self evident that this argument and statements of the Commission clearly establishes the importance of allowing the petitioners to introduce their evidence. It is axiomatic that if this assumption which the Commission has based its entire argument upon is fallacious and contrary to the true facts of the case, this court should not hesitate in setting aside the order. As the petitioners' evidence would prove the falsity of the assumption, it is self evident that the Commission in denying the petitioners the opportunity to introduce their evidence deprives them of having a fair and impartial hearing, which is clearly a violation of the due process clause of the Constitution and the Administrative Procedure Act.

The cases cited by the Commission in this emotional appeal are all dealing with lotteries, most of which are giving money as prizes and deal with that type of lottery exclusively, wherein a great number of lottery tickets are sold over a large extent of territory. What is true of these lotteries the petitioners' evidence would establish is not present in the use of punch boards.

Petitioners would not use the word "irony" if it were not for the fact that the Commission's plea for this additional power is limited strictly to the shipment and use of punch boards. If the Commission was endeavoring to acquire jurisdiction over all forms of lottery and gambling devices, then there would be no irony in their position. However, for the Commission to make such a plea when it is realized that they shut their eyes entirely to the interstate shipment of all other forms of lottery and gambling devices, such as slot machines, dice, roulette wheels, bingo and keno paraphernalia, etc. and center their entire attack upon the type of punch boards which are used exclusively to distribute merchandise, it seems to the petitioners that the word "irony" is appropriate.

This is especially true in the light of the fact that Congress in public law 906 provided for an exception to that law where the use of the instrumentalities, slot machines, are legal by local authorities, whereas the Commission's contention is that they should have the power to prevent the interstate shipment of punch boards even in the states wherein their use is legal. Petitioners feel that the irony of the situation is well illustrated in the fact that the Commission stands by with regard to the shipment of all gambling and lottery devices into the State of Nevada but contends that they should have jurisdiction to prohibit the shipment of punch boards into said state. Before concluding this point, let us set out two other ideas; the first is, that unless the use of punch boards is either unfair to competitors or the people who use them there is no basis for the Commission's plea for authority. In other words, the Commission's plea for jurisdiction is based upon the fact that it contends that the use of these punch boards to distribute merchandise is an unfair method of competition or an unfair act of practice. They contend that there is an irrebuttable presumption that the use of punch boards is an unfair method of competition or unfair act of practice while on the other hand the petitioners contend that whether or not the use is unfair is subject to proof and therefore they have a right to introduce their evidence to establish the nature of such transactions. The second idea is, that the Commission contends and the Sixth Circuit held that the use of punch boards even though such use is intrastate is against the public policy of the United States. Wherein the irony of this contention comes in is this; that the Commission does not contend that any other intrastate form of lottery or gambling is against the public policy of the United States. In addition the Commission even contends that the use of punch boards is against the public policy of the United

States even though it has been declared by local authorities that the use of them is not against the public policy of the State or local authorities. In other words, the Commission says, even though the State Legislature or some other local authority says that within the borders of such local authority the use of punch boards is not against the public policy of said state, the Commission contends that they are still against the public policy of the United States. This position is not only contrary to a policy that Congress has always adopted but it is in direct conflict with the Tenth amendment of the constitution reserving the police power to the states.

Petitioners' Punch Boards Are Not Per Se Lottery or Gambling Devices.

That which the Commission states on page 18 in its brief concerning the questions being on the tickets is clearly out of order for two reasons; first, the Commission should not characterize in such a manner as it does the use of punch boards wherein questions are printed upon the tickets until the petitioners have been afforded the opportunity of introducing their evidence concerning the use of these boards; second, the cases cited on page 24 of petitioner's brief involving the use of the question and answer theory were all decided long before the F.T.C. instituted any proceedings of this nature so that the Commission's characterization of this type of punch board "*as a new type of punch board*" is clearly inaccurate.

Petitioners contend that they are entitled to introduce evidence showing all the surrounding circumstances concerning the use of punch boards in a legal manner. Until this opportunity has been afforded them, it is their contention that they have not been granted a fair and impartial hearing.

At this point we wish to call the Court's attention to the fact that all of the Commission's exhibits, which are punch boards, will establish that all the boards made by the petitioners have the questions printed on the back of the tickets, that is, the slips of papers in the holes. If there is any question about this the Court can punch out some of the slips of paper.

At this point the petitioners would like to call the Court's attention to the fact that a bill was introduced in the 82nd Congress to prohibit, among other things, the interstate shipment of punch boards. This bill, while being reported out of a Senate Committee, has not even passed the senate and it seems safe to say that at this late date there is no possibility that it will be passed and become a law. This should be conclusive evidence that Congress does not regard the interstate shipment of punch boards as a thing which the Government, either by an Act of Congress or through any administrative agency, should prohibit. The main point the petitioners have for calling the Court's attention to this bill is that the bill provides as follows:

“(d) For the purposes of this section the phrase punch board or push card * * * shall not include devices numerically keyed to an answer sheet * * *.”

An Analysis of the Brewer Case With the Reilly Case Will Show the Necessity of a Strict Construction of the Brewer Case.

An analysis of the holding in the *Brewer* Case with the holding in the Case of *Reilly, Postmaster v. Pinkus*, 338 U. S. 269 at 277, will show that the order in this case must be limited to restraining the petitioners from “*aiding and abetting, inducing and procuring manufacturers and wholesale and retail dealers in merchandise to use unfair or deceptive acts or practices and unfair methods*

of competition.” The holding in the *Brewer Case* is limited to the proposition that the petitioners’ unfair acts and practices which can be restrained are only the acts and practices which amount to aiding, abetting, inducing and procuring others to use unfair or deceptive acts or practices and unfair methods of competition. It must be noticed and emphasized that the Court in the *Brewer Case* did not hold that aiding and abetting alone is sufficient, the Court inserted the words “inducing and procuring.” Under such wording as this the mere aiding and abetting is not sufficient to give the Commission jurisdiction herein but there must be a positive showing that the acts complained of in addition to aiding and abetting, induce and procure. The petitioners proffered evidence would establish beyond doubt that the petitioners’ acts certainly do not induce or procure manufacturers, wholesalers and retailers in merchandise to use unfair or deceptive acts or practices and unfair methods of competition.

Applying the holding in the *Reilly v. Pinkus Case* to the above announced principle of law, it is self evident that the order must be confined to an order restraining the petitioners from aiding, abetting, procuring and inducing manufacturers, wholesalers and retailers in merchandise to use unfair or deceptive acts or practices and unfair methods of competition. The Supreme Court in the *Pinkus Case* is very emphatic that the Commission cannot issue an order that would wholly destroy the business of the petitioners, which the order herein in its present form certainly does. The Supreme Court also in this case is very emphatic to the effects that the F.T.C.’s authority is limited to restraining the “use” of unfair acts or practices and unfair methods of competition and not to the absolute prohibition of the shipment of the merchandise, as the order in the case at bar does.

For the reason hereinabove set forth, the petitioner respectfully requests this court to set aside the order issued herein.

Respectfully submitted,

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 13011

BERNICE FEITLER and IRWIN FEITLER, Individ-
ually and Trading as GARDNER & COMPANY,
Petitioners,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

Petition for Rehearing

PETITION TO REVIEW AN ORDER OF
THE FEDERAL TRADE COMMISSION

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PETITION TO REVIEW AN ORDER OF
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PETITION FOR REHEARING.

Come now the above named petitioners and respectfully petition the Court for a rehearing hereof for the following reasons.

It seems obvious to the petitioners that the opinion in the instant case is clearly, not only contrary to and in conflict with this Court's holding in the *Lichtenstein* Case but is a complete overruling of all of the following principles of law laid down by the Supreme Court in the following cases; to wit: *F.T.C. v. Klesner*, 280 U.S. 19; *F.T.C. v. Raladam Co.*, 283 U.S. 643; *F.T.C. v. Royal Milling Co.*, 288 U.S. 212; *F.T.C. v. Keppel & Bro.*, 291 U.S. 304; *Schechter Poultry Corp. v. United States*, 295 U.S. 495; *F.T.C. v. Bunte Bros.*, 312 U.S. 349; *Reilly, Postmaster v. Pinkus*, 388 U.S. 269; *Jacob Siegel Co. v. F.T.C.*, 327 U.S. 608; and *F.T.C. v. A. P. W. Paper Co., Inc.*, 328 US. 193.

Let us first discuss briefly each of the above cases and then point out wherein the instant case is in direct conflict with them, particularly showing that the case at bar is not supported by the *Lichtenstein Case*.

The Supreme Court in setting aside the Commission's order in the case of *F.T.C. v. Klesner*, 280 U.S. 19, held that to bring a case within the jurisdiction of the Commission the Public interest must be specific and substantial. In this case the Supreme Court set aside the order on the ground that the proceeding therein was not to the interest of the public as required by the F.T.C. Act. This is an announcement of two fundamental, essential and indispensable principles, first the public interest must be specific, and second, it must be substantial.

In the case of *F.T.C. v. Raladam Co.*, 283 U.S. 643, there is an enlightening discussion by the Supreme Court concerning the requirement of and what is substantiality required in cases arising under this statute. This will be discussed at length hereinafter.

In the case of *F.T.C. v. Royal Milling Co.*, 288 U.S. 212, at page 217, the Court says:

“The result of respondents' acts is that such purchasers are deceived into purchasing an article which they do not wish or intend to buy, and which they might or might not buy if correctly informed as to its origin. We are of the opinion that the purchasing public is entitled to be protected against that species of deception, and that its interest in such protection is specific and substantial.”

In the case of *F.T.C. v. Keppel & Bro.*, 291 U.S. 304, the Court says:

“It is true that the Statute does not authorize regulation which has no purpose other than that of relieving merchants from troublesome competition or of censoring the morals of businessmen.” (Italics supplied.)

The Court in addition laid down the rule that the Commission's authority is limited to the elimination of unfair marketing methods, that the Commission's authority is limited to the restraining of competitive methods and that the Commission has no authority to bar the selling and distributing of a product.

The Supreme Court in the case of *Schechter Poultry Corp. v. United States*, 295 U.S. 495, held that Congress has no power over intrastate transactions which do not have a direct effect upon interstate commerce.

In the case of *F.T.C. v. Bunte Bros.*, 312 U.S. 349, the Supreme Court held that the F.T.C. does not have any jurisdiction over intrastate commerce.

The Supreme Court in the case of *Reilly, Postmaster v. Pinkus*, 388 U.S. 269, laid down the principle of law that the Commission has no authority to bar the selling and distributing of a product and also that the Commission's order can only restrain methods of competition, that is, marketing methods and that the order must be so framed that after barring a method of competition the offender must be let free to otherwise sell his product.

In the case of *Jacob Siegel Co. v. F.T.C.*, 327 U.S. 608, the rule of law is laid down by the Supreme Court that the Commission's authority and jurisdiction is limited solely to the restraining of the use of marketing methods. In laying down this rule of law, the court in this case cited the case of *F.T.C. v. Winsted Hosiery Co.*, 258 U.S. 483, in doing so the court makes it clear that the case at bar is also in conflict with the *Winsted* Case.

In the case of *A.P.W. Paper Co., Inc.*, 328 U.S. 193, there is laid down four principles which we wish to set out, (1) that before the amendment of 1938 the Commis-

sion's authority was confined absolutely to the protection of competitors against unfair methods of competition, (2) that the only public interest before the amendment was the public interest which the public had in eliminating the unfair method of competition, (3) after the amendment the Commission's authority and jurisdiction was enlarged to include the right and authority to protect consumers, therefore, that after the amendment the Commission's authority is limited to either the protection of competitors from unfair methods of competition or consumers from acts which result in purchasers being deceived into purchasing an article which they do not wish or intend to buy, and which they might or might not buy if correctly informed as to its origin, (4) that the public interest is exactly the same after the amendment as before the amendment.

In a footnote the court said:

“In *F.T.C. v. Raladam Co.*, 283 U.S. 643, 647, 648, the Court had ruled that, ‘The paramount aim of the act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree, and this presupposes the existence of some substantial competition to be affected, since the public is not concerned in the maintenance of competition which itself is without real substance’. The 1938 Amendment to Sec. 5 of the F.T.C. Act was designed to make ‘the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor’.”

Before taking up the above principles and the *Lichtenstein* Case, it is important to have a clear and concise understanding of the facts which the petitioners wished to establish by their proffered but rejected evidence. The

first of these facts, and one of which is of vital importance to the resolving of this case, is that there are two separate and distinct fields in the distribution of merchandise by chance, (1) the field of merchandising by gambling, (2) gambling for merchandise. There is a marked and substantial difference between the field of merchandising by gambling and the field of gambling for merchandise. The petitioners are the first to attempt to show by evidence or otherwise and rely upon this difference. This difference in the two fields of activity is of such a magnitude that what may be true as to one of them is not true as to the other. To illustrate the so-called "break and take" or "draw deals", the type involved in the *Keppel* Case, are typical of the cases wherein a piece of candy is sold and in addition to the candy purchased the purchaser receives a chance to win a prize, that is, in all cases wherein there is a sale of a commodity, and in addition to receiving the commodity the buyer thereof is also given a chance to win an additional prize. In such cases it is merchandising by gambling. On the other hand, in cases wherein the gambling is for merchandise as distinguished from merchandising by gambling, there is no sale of a product or commodity, the entire transaction is simply that an amount of money is given for a chance, if the player is lucky he wins a prize, if he is unlucky he does not receive anything at all for his money. One of the important elements of this difference is that the volume of merchandise sold in the field of merchandising by gambling is entirely different and cannot be attributed to the field of gambling for merchandise. When this volume is eliminated, that is, not taken into account as a volume in the field of gambling for merchandise, the amount of merchandise involved in the field of gambling for merchandise is not substantial enough to give the commission jurisdiction over this field of activity.

The point we are making here is that the petitioners claim the right to show by evidence that within the field of gambling for merchandise there is no specific public interest and the volume of this field is not sufficient to meet the requirements of substantiality required by the Supreme Court cases to give the commission jurisdiction. The evidence would show that this whole field of activity is negligible. This being true, the Commission's refusal to allow the petitioners to introduce their evidence deprived them of a fair hearing which is a violation of their right to due process of law.

This brings us to a discussion of the difference between the case at Bar and the *Lichtenstein* Case. Let us first take up the *Lichtenstein* Case. As this case followed the *Brewer* Case, in order to determine the holding in the *Lichtenstein* Case we must refer to the *Brewer* Case. The crux and limitation of these two cases is set out unequivocally in the following quotation from the *Brewer* Case:

“For the reasons hereinafter appearing, we have reached the conclusion that, in thus aiding and abetting, inducing and procuring manufacturing and wholesale and retail dealers in merchandise to use unfair or deceptive acts or practices and unfair methods of competition, Charles A. Brewer and Son, though manufacturing no merchandise except the lottery devices which they ship in interstate commerce, fall within the restraining power of the Federal Trade Commission as vested by the Federal Trade Commission Act. (52 Stat. 111.)”

From this quotation it is self-evident that the only theory involved in the *Lichtenstein* Case is that one who aids, abets, induces or procures another to use unfair methods of competition or unfair acts or practices is himself within the purview of the F.T.C. Act. Under this

theory it becomes an essential issue whether or not the people who use punch boards use an unfair method of competition or an unfair act or practice. Under all of the cases this issue can only be determined by introducing evidence which will establish the facts set out by the Court in the *Brewer* Case, that is to wit: quoting from the *Brewer* Case:

“The final finding of the Federal Trade Commission stated: ‘The practice of respondents (petitioners here) in selling and distributing their lottery devices thus serves to place in the hands of others means and instrumentalities whereby they are enabled to use unfair methods of competition and thereby unfairly to divert substantial trade to themselves from those who do not use such methods.’”

The petitioners’ evidence would establish beyond controversy that the use of the punch boards to distribute merchandise does not divert any trade, therefore, it certainly does not divert a substantial amount of trade. That is to say, that the Commission could not in the face of the petitioners’ evidence, make such a finding, if it did so, under such circumstances a Court would without hesitation set aside said finding on the grounds that it was not only not supported by the evidence but was clearly in conflict with it. In a case wherein there is not such a finding, that is to say in the absence of such a finding, the *Brewer* and *Lichtenstein* Cases have no application. From this it is self-evident that the *Brewer* and *Lichtenstein* Cases are absolute authority for petitioners’ proposition that they are entitled to introduce their evidence and that the denial of such a right is a violation of their constitutional right to due process of law.

Now as to the applicability of the principles of law herein above set out, the *Brewer* and *Lichtenstein* Cases

go on the theory as we have said before, that the use of the punch board is an unfair method of competition and an unfair act or practice within the intent and meaning of the F.T.C. Act. In other words, all the above principles are taken into consideration in determining the conduct of the users of the board. Then the cases go one step further than any case heretofore and say that Congress intended that in addition to having power to restrain the use of unfair methods of competition or unfair acts and practices, the Commission has power to stop anyone aiding, abetting, inducing, procuring others to use such methods. Beyond this the *Lichenstein* and *Brewer* Cases do not go.

The case at bar does not follow the above theory but is an entirely different theory having no similarity whatsoever to the theory of the *Lichtenstein* and *Brewer* Cases. This case is based solely upon the theory that the Commission is given authority over acts which encourage the public to gamble. This clearly amounts to the censoring of morals, as we have shown above, the Supreme Court has held definitely that the Commission has no jurisdiction whatsoever on the basis of public morals.

It seems to the petitioners that there is no solid foundation upon which to predicate the Commission's jurisdiction to stop the interstate shipments of a device which is to be used to distribute merchandise by chance when the basis of such holding is the use of such device encourages the public to gamble, that is, if the basis of the jurisdiction, the encouraging of the public to gamble, then the jurisdiction of the Commission should extend to the elimination of all devices which will be used to encourage the public to gamble, but in the instant case the Court holds definitely that the Commission does not have jurisdiction over

gambling devices as such, that is to say, it does not seem logical to the petitioners to say the Congress intended to give the Commission such a limited jurisdiction over the encouraging of gambling. It seems that the only logical interpretation of the grant of power would be that the Commission either has full power to stop the shipment of devices which will encourage gambling by the public, or that it has absolutely no power upon this basis. In other words it seems to the petitioners that it is inconsistent to hold that:

“We agree that the Commission’s authority does not extend to the interstate shipment of gambling devices as such, but only to such shipments as amount to unfair trade practices,”

and having held as above to then lay down the principle of law that

“It is the fact that the interstate shipment by these devices facilitates a kind of merchandising which induces and encourages the public to gamble, which makes such shipment an ‘unfair trade practice.’”

As to the question of the public interest, the Supreme Court in the *Raladam* Case has the following to say:

“By these additional words, protection to the public interest is made of paramount importance but, nevertheless, they are not substantive words of protection, but complimentary words of limitation beyond the jurisdiction conferred by the language immediately preceding.”

and this Court in the *Lichtenstein* Case on the question of public interest said:

“Petitioner further urges that the prevention of the use of its gambling devices in the sale of merchandise to the ultimate consumer is not in the public interest. We find no merit in this contention. The language of the Supreme Court in *Phalen v. Virginia*, 49 U.S. 163

(1850), as to the “pestilence” of lotteries which “enters every dwelling * * * reaches every class * * * and preys upon” and “plunders the ignorant and simple” applies with force many times multiplied to the spread of lottery methods into line after line of merchandise.”

Petitioners contend that this is the only basis upon which the requirement of public interest is satisfied in the *Lichtenstein* Case. This being true, the public interest rests upon a fact which petitioners contend they have the right to introduce evidence, in other words the petitioners' evidence would certainly establish that what is said in the *Lichtenstein* Case about the use of punch boards making inroads into line after line of merchandise has no foundation whatsoever in fact. This being true, there is no basis **upon which to predicate** the requirement that this proceeding is in the interest of the public. Because we have shown above that the law is well settled by the Supreme Court, that the only public interest which will sustain the Commission's jurisdiction is the interest the public has in the elimination of either a practice which is unfair to competition or consumers. The fact that maybe the elimination of either the practice or act would be beneficial to the **public morals, health or otherwise**, other than the two situations mentioned above, does not satisfy the requirements of public interest.

For the above foregoing reasons, the petitioners respectfully request the Court to grant this their petition for a rehearing.

Respectfully submitted,

F. W. JAMES,

Attorney for Petitioners.

Certificate.

Comes now the undersigned attorney for petitioners herein and hereby certifies that in his judgment this Petition is well founded and is not interposed for delay.

F. W. JAMES

Attorney for Petitioners



No. 13102

**United States
Court of Appeals**
for the Ninth Circuit.

JAMES M. McCLOSKEY, as Trustee in Bankruptcy for the Estate of Elliott Wholesale Grocery Company, a Corporation, Bankrupt,
Appellant,

vs.

DIVISION OF LABOR LAW ENFORCEMENT,
Department of Industrial Relations, State of California,

Appellee.

Transcript of Record

**Appeal from the United States District Court,
Southern District of California,
Central Division.**

FILED

MAR - 3 1952

No. 13102

United States
Court of Appeals
for the Ninth Circuit.

JAMES M. McCLOSKEY, as Trustee in Bankruptcy for the Estate of Elliott Wholesale Grocery Company, a Corporation, Bankrupt,

Appellant,

vs.

DIVISION OF LABOR LAW ENFORCEMENT,
Department of Industrial Relations, State of
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Appellee.

Transcript of Record

**Appeal from the United States District Court,
Southern District of California,
Central Division.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

CRAIG, WELLER & LAUGHRAN,

C. E. H. McDONNELL,

111 West 7th St.,

Los Angeles, Calif.,

For the Appellant.

PAULINE NIGHTINGALE,

EDWARD M. BELASCO,

LEON H. BERGER,

Attorneys Division of Labor Law Enforcement
State of Calif.,

503 State Bldg.,

Los Angeles, Calif.,

For the Appellee.



In the District Court of the United States, Southern
District of California, Central Division

No. 50151

In the Matter of:

ELLIOTT WHOLESALE CO., a California Corporation,

Alleged Bankrupt.

INVOLUNTARY PETITION
IN BANKRUPTCY

To the Honorable Judges of the United States
District Court for the Southern District of
California, Central Division:

The Petition of Purex Corporation, Hunt Foods,
Inc., and Lever Bros. Co., respectfully represents:

I.

That Elliott Wholesale Co., a California Corporation, has its principal place of business in the City of Santa Barbara, County of Santa Barbara, State of California, within the above judicial district, and has had said principal place of business for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district, and owes debts to the amount of \$1,000.00 and more, and is not a municipal, railroad, insurance or banking corporation, or a building and loan association, but is engaged in the wholesale grocery business.

II.

That your petitioners are creditors of the said alleged bankrupt, having provable claims amounting in the aggregate in excess of securities held by them in the sum of \$500.00 or more.

III.

That the nature and amounts of your petitioners' claims are as follows:

That within two years last past, at Los Angeles, California, the alleged bankrupt herein became indebted to Purex Corporation, Ltd., in the sum of \$999.20, for goods, wares and merchandise delivered by the said Purex Corporation, Ltd., to the alleged bankrupt on an open account; that no part thereof has been paid, although payment was duly demanded of the alleged bankrupt prior to the commencement of this action.

That within two years last past, at Los Angeles, California, the alleged bankrupt became indebted to Hunt Foods, Inc., in the sum of \$1,290.02, for goods, wares and merchandise delivered by the said Hunt Foods to the alleged bankrupt on an open account; that no part thereof has been paid, although payment was duly demanded of the alleged bankrupt prior to the commencement of this action.

That within two years last past, at Los Angeles, California, the alleged bankrupt became indebted to Lever Bros Co., in the sum of \$764.17, for goods, wares and merchandise delivered by the said Lever Bros. Co. to the alleged bankrupt upon an open account; that no part thereof has been paid, al-

though payment was duly demanded of the alleged bankrupt prior to the commencement of this action.

IV.

That your petitioners further represent that the said alleged bankrupt, Elliott Wholesale Co., did, within the four months next preceding the date of the filing of this petition, commit an act of bankruptcy in that on or about the 3rd day of June, 1950, it made an assignment for the benefit of creditors to F. L. Farrell, of Santa Barbara, California.

Wherefore, your petitioners pray that services of this petition, with subpoena, may be made upon the said alleged bankrupt as provided in the Act of Congress relating to bankruptcy, and that the said alleged bankrupt may be adjudged by this Court to be a bankrupt within the purview of said Act.

PUREX CORPORATION, LTD.,

By /s/ G. A. EVANS,
Secretary.

HUNT FOODS, INC.,

By /s/ JOSEPH R. HARMON,
Secretray.

LEVER BROS. CO.

By /s/ MILTON D. KLEIN,
Authorized Agent and
Attorney-in-Fact.

QUITTNER, STUTMAN &
SHUTAN,

By /s/ JACK STUTMAN,
Attorneys for Petitioning
Creditors.

Duly verified.

[Endorsed]: Filed July 21, 1950.

[Title of District Court and Cause.]

ORDER OF GENERAL REFERENCE

At Los Angeles, California, in said district on the 21st day of July, 1950;

Whereas, a petition was filed in this court on the 21st day of July, 1950, against Elliott Wholesale Co., a corporation, alleged bankrupt above named, praying that it be adjudged a bankrupt under the Act of Congress relating to bankruptcy, and good cause now appearing therefor;

It is ordered that the above-entitled proceeding be, and it hereby is, referred to David B. Head, Esq., one of the referees in bankruptcy of this court, to take such further proceedings therein as are required and permitted by said Act, and that the said Elliott Wholesale Co., a corporation, shall henceforth attend before said referee and submit

to such orders as may be made by him or by a judge of this court relating to said bankruptcy.

/s/ PAUL J. McCORMICK,
United States District Judge.

[Endorsed]: Filed July 21, 1950.

[Title of District Court and Cause.]

ADJUDICATION OF BANKRUPTCY

At Los Angeles, in said District, on the 16th day of August, 1950.

The petition of Purex Corporation, Hunt Foods Inc., and Lever Bros. Co., filed on the 21st day of July, 1950, that Elliott Wholesale Co. be adjudged a bankrupt under the Act of Congress relating to bankruptcy, and the time within which an answer might be filed having expired; and there being no opposing interest;

It is adjudged that the said Elliott Wholesale Co. is a bankrupt under the Act of Congress relating to bankruptcy.

/s/ DAVID B. HEAD,
Referee in Bankruptcy.

[Endorsed]: Filed August 17, 1950.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable Judges of the United States District Court, Southern District of California, Central Division:

The undersigned, David B. Head, Referee in Bankruptcy, certifies as follows:

Trustee filed objections to the claim filed herein by the Division of Labor Law Enforcement, Department of Industrial Relations, State of California, representing an aggregation of the claims of a number of the employees of the bankrupt corporation. I determined that as to that portion of the claim founded upon "severance pay" the objections filed by the trustee must be sustained and held accordingly that the claims for "severance pay" were not entitled to priority under the provisions of Section 1204 of the California Code of Civil Procedure, but should be allowed as a general unsecured claim only. An Order denying priority to that portion of the claim founded upon "severance pay" was entered. From this order the Division of Labor Law Enforcement, Department of Industrial Relations, State of California, has petitioned for review.

Inasmuch as there is no Reporter's Transcript of the proceedings in this matter I shall outline the evidence. Without dispute the evidence shows the following facts: the bankrupt operated a sizable wholesale grocery business in the city of Santa Barbara, California. The employees here claiming sev-

erance pay were employed under a union contract which was in effect up to the date of termination of business. Article 3, Section 5 of the said union contract provided as follows:

“Except for dishonesty, drinking on the job, or gross insubordination, the employer shall give one week’s notice or one week’s pay in lieu thereof when discharging or laying off an employee. Employees desiring to quit their job shall give the employer one week’s notice.”

On June 2nd, 1950, the bankrupt corporation made a general assignment for benefit of creditors. On July 21, 1950, the within bankruptcy proceedings were commenced by the filing of an involuntary petition in bankruptcy. The Division of Labor Law Enforcement, Department of Industrial Relations, State of California, filed a claim in these proceedings which included the claims of the following persons for “severance pay”:

Alec W. Robinson.....	\$74.50
Leo P. Jensen.....	74.50
Ronald A. Grell.....	4.15
Elbert W. Whitney.....	84.60
James F. Bond.....	74.50
Mario Pezzati.....	68.50

All of the said employees were discharged because of the cessation of the operations by the bankrupt corporation shortly prior to the assignment for benefit of creditors. None of the claimants resigned or quit their jobs, nor were any of them discharged for dishonesty, drinking on the job or gross insubordination.

None of those individuals claiming severance pay received either one week's notice of their discharge or in lieu thereof one week's "severance pay."

The Division of Labor Law Enforcement, Department of Industrial Relations, State of California, contended before me that the claims for severance pay were entitled to priority under Section 1204 of the California Code of Civil Procedure. Counsel for the trustee argued that these provisions for severance pay were actually provisions for liquidated damages and therefore did not fall within a provision of California Code of Civil Procedure Section 1204 which grants a priority for "wages and salaries * * * for personal services rendered." I agreed with the latter contention and accordingly found as indicated hereinbefore.

The question presented by this review is:

Does Section 1204 of the California Code of Civil Procedure grant priority of payment to "severance pay" provided for in an employment contract?

I further certify the following papers from the file:

(1) Objections of the Trustee to Claim of the Division of Labor Law Enforcement, Department of Industrial Relations, State of California.

(2) Original claim filed in the within proceedings by the Division of Labor Law Enforcement, Department of Industrial Relations, State of California.

(3) Amended Claim filed in the within proceedings by the Division of Labor Law En-

forcement, Department of Industrial Relations, State of California.

(4) Findings of Fact, and Conclusions of Law.

(5) Order on Trustee's Objection to the claims of Division of Labor Law Enforcement, Department of Industrial Relations, State of California.

(6) Petition for Review.

Dated June 15, 1951.

/s/ DAVID B. HEAD,
Referee in Bankruptcy.

[Title of District Court and Cause.]

PROOF OF DEBT IN BANKRUPTCY
TO CLAIM STATUTORY LIEN

At Santa Barbara, in said District of California, on the 19th day of October, 1950, came R. Lee Ste. Fleure, as Deputy of the Division of Labor Law Enforcement of the Department of Industrial Relations of the State of California, of Santa Barbara, in the County of Santa Barbara, in said District of California, and made oath and said:

That Elliott Wholesale Co., a Corporation (against, by) whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to said Division in the sum of Five Hun-

dred Eighty and 39/100ths Dollars (\$580.39); that the consideration of said debt is as follows:

Wages earned by the persons listed in the attached exhibit, marked "Exhibit A," which is hereby referred to and made a part hereof as if here set forth in full; and that all of the said persons listed in said exhibit have duly assigned in writing their said claims and statutory liens for labor and services to the Chief of the Division of Labor Law Enforcement of the Department of Industrial Relations of the State of California, to collect under the authority vested in him by the laws of said State; that John F. Dalton is the duly appointed, qualified, and acting Chief of said Division, and that under and by virtue of the laws of said State, affiant is the duly authorized person to act for and on behalf of the said John F. Dalton and to file this claim; that said Division is now the sole owner and holder of said claims and liens; that no part of said sum of \$580.39 has been paid; that there are no setoffs nor counterclaims to the same; and deponent further says that no note has been received for such account nor any judgment rendered thereon.

Deponent claims a statutory lien herein on property and funds transferred or to be transferred by the assignee for the benefit of creditors to the trustee herein; and in connection with his claim for a statutory lien, recites that on or about June 2nd, 1950, said bankrupt assigned his business to F. L. Farrell, as assignee for the benefit of creditors; that all of the claims of the assignors of said Division

of Labor Law Enforcement are claims for labor incurred within ninety (90) days prior to said assignment for the benefit of creditors; that under Section 1204 of the Code of Civil Procedure of the State of California, said claims are preferred claims and liens, and must be paid by the assignee for the benefit of creditors as soon as the money with which to pay the same becomes available; that preferred claims and liens were filed, as provided by law, by all of said assignors with said assignee for the benefit of creditors; that said assignee had charge of the assets of said bankrupt received by said assignee prior to the filing of the petition in bankruptcy herein, out of which funds said Division's assignors were entitled to be paid.

Deponent claims a statutory lien upon said property and funds passed to the trustee herein, under the laws of the State of California, and of the United States, for the claims of all of the assignors of said Division on Labor Law Enforcement.

/s/ R. LEE STE. FLEURE,
Deputy, Santa Barbara Office, Division of Labor
Law Enforcement Department of Industrial
Relations, State of California.

Subscribed and sworn to before me this 19th day
of October, 1950.

J. E. LEWIS,
County Clerk,

[Seal] By /s/ F. G. BAKER,
Deputy Clerk.

EXHIBIT "A"

Name:	Nature of Work	Dates Worked 1950	No. of Months	Rate per Month or Week	Amount Due
Vincent L. Nicoletti.....	Warehouse manager	3/2 to 5/26	2-26/31sts mos.	\$270.00 mo.	\$62.37
Alec W. Robinson.....	Route salesman	3/2 to 5/26	2-26/31sts mos.	74.50 per week	40.98
Minna Wilcox	Bookkeeper	3/2 to 6/2	3 months	260.00 mo.	32.50
Leo P. Jensen	Driver-salesman	3/2 to 6/1	3 months	74.50 per week	40.98
Bert G. Donaldson.....	Manager	3/2 to 6/1	3 months	400.00 mo.	200.00
Ronald A. Grell	Route supervisor	3/2 to 5/26	2-26/31sts mos.	84.50 per week	42.25
Elton N. Keller	Salesman	3/2 to 5/26	2-26/31sts mos.	68.50 per week	51.38
Elbert W. Whitney.....	Warehouse foreman	3/2 to 6/2	3 months	1.76 1/4 per hour	35.20
James F. Bond	Driver-salesman	3/2 to 5/29	2-29/31sts mos.	74.50 per week	40.98
Mario Pezzati	Truck-driver	3/2 to 5/19	2-17/31sts mos.	1.14 1/4 per hour	33.75
Total					<u>\$580.39</u>

[Endorsed]: Filed October 2, 1950, Referee.

In the Matter of the Assignment for the Benefit of
Creditors of the Elliott Wholesale Company,
a Corporation, of Santa Barbara, County of
Santa Barbara, State of California.

Labor Commissioner's No. 18315M

NOTICE OF PREFERRED LABOR CLAIM

C.C.P., Sec. 1206

To F. L. Farrell, Assignee for the Benefit of Creditors of the Elliott Wholesale Company, a Corporation;

You Will Take Notice that the claimants hereinafter named performed work and rendered services for the said Assignor within ninety days prior to the Assignment for the Benefit of Creditors of The Elliott Wholesale Company, a Corporation, of the nature indicated below, between the dates indicated, both dates inclusive, at the rate stated and for the time stated, and earned in the said period the sum indicated, no part of which has been paid and the whole of which still remains due, owing and unpaid:

Name of Claimant	Nature of Work	Dates Worked 1950	No. of Months	Rate per Month or Week	Amount Due
Vincent L. Nicoletti..	Warehouse manager	3/2 to 5/26	2-26/31sts mos.	\$270.00 mo.	\$62.37
Alec W. Robinson.....	Route salesman	3/2 to 5/26	2-26/31sts mos.	74.50 per week	40.98
Minna Wilcox	Bookkeeper	3/2 to 6/2	3 months	260.00 mo.	32.50
Leo P. Jensen	Driver-salesman	3/2 to 6/1	3 months	74.50 per week	40.98
Bert G. Donaldson....	Manager	3/2 to 6/1	3 months	400.00 mo.	200.00
Ronald A. Grell	Route supervisor	3/2 to 5/26	2-26/31sts mos.	84.50 per week	42.25
Elton N. Keller	Salesman	3/2 to 5/26	2-26/31sts mos.	68.50 per week	51.38
Elbert W. Whitney....	Warehouse foreman	3/2 to 6/2	3 months	1.76 $\frac{1}{4}$ per hour	35.20
James F. Bond	Driver-salesman	3/2 to 5/29	2-29/31sts mos.	74.50 per week	40.98
Mario Pezzati	Truck-driver	3/2 to 5/19	2-17/31sts mos.	1.41 $\frac{1}{4}$ per hour	33.75
Total					<u>\$580.39</u>

That the said claims have been assigned to the State Labor Commissioner for collection, and that he is now sole owner and holder thereof; that the facts regarding said claims have been investigated by the State Labor Commissioner and found to support the claims.

This therefore is to demand that you, the said Assignee for the Benefit of Creditors, etc., shall under and pursuant to the provisions of Section 1204 of the Code of Civil Procedure, State of California, pay to the undersigned the amount set forth above as a preferred labor claim.

JOHN F. DALTON,

State Labor Commissioner,

By /s/ R. LEE STE. FLEURE,

Deputy Labor Commissioner.

State of California,

County of Santa Barbara—ss.

R. Lee Ste. Fleure, being first duly sworn, deposes and says: That he is a duly appointed, authorized, and acting Deputy of the State Labor Commissioner; that he has read the foregoing Notice of Preferred Labor Claim and knows the contents thereof, and that the statements contained therein are true of his knowledge, except those statements based upon information and belief, and as to those matters he believes them to be true.

/s/ R. LEE STE. FLEURE,

Deputy Labor Commissioner.

Subscribed and sworn to before me this 27th day of July, 1950.

J. E. LEWIS,
County Clerk,

[Seal] By /s/ F. G. BAKER,
Deputy Clerk.

Affidavit of service of copy of claim attached.

[Endorsed]: Filed October 23, 1950, Referee.

[Title of District Court and Cause.]

OBJECTIONS TO CLAIMS AND NOTICE
OF HEARING OF OBJECTIONS

The undersigned, the duly elected, qualified and acting Trustee in Bankruptcy herein, files his objections to claims which have been filed in these proceedings, and as and for his objections thereto, alleges as follows:

Division of Labor Law Enforcement,
Santa Barbara, California.

#80 \$580.39

Trustee objects to the allowance of the above-captioned claim, which aggregates a number of labor claims, on the grounds that it is insufficiently itemized to enable the Trustee to check the precise times during which the claimed wages were earned. Trustee further objects to the allowance of the claims of Vincent Nicoletti in the amount of \$62.37, that of Bert G. Donaldson in the amount of \$200.00, Ronald A. Grell in the amount of \$42.25, and Elbert

W. Whitney in the amount of \$35.20 as prior claims on the grounds that said employees were supervisory employees and hence are not entitled to priority under the provisions of the bankruptcy act. Trustee accordingly alleges that whatever sums are allowed for the hereinbefore specifically set out claimants should be allowed as general unsecured claims only.

Wherefore, your Trustee prays that his Objections be heard and appropriate Orders be made in the premises.

/s/ JAMES M. McCLOSKEY,
Trustee in Bankruptcy.

To the Above Creditors and Their Attorneys:

You Are Hereby Notified that the Trustee in Bankruptcy herein has made and filed herein his written Objections to claims, as hereinbefore set forth, and the same have been set for hearing before the Honorable David B. Head, Referee in Bankruptcy, in the City Hall Building, Santa Barbara, California, on the 4th day of May, 1951, at the hour of 10 o'clock A.M.

Dated April 10, 1951.

CRAIG, WELLER &
LAUGHARN,

By /s/ C. E. H. McDONNELL,
Attorneys for Trustee.

[Endorsed]: Filed April 19, 1951, Referee.

[Title of District Court and Cause.]

AMENDED PROOF OF DEBT IN BANK-
RUPTCY TO CLAIM STATUTORY LIEN

At Santa Barbara, in said District of California, on the 23rd day of April, 1951, came R. Lee Ste. Fleure, as Deputy of the Division of Labor Law Enforcement of the Department of Industrial Relations of the State of California, of Santa Barbara, in the County of Santa Barbara, in said District of California, and made oath and said:

That he, in his official capacity as Deputy of said Division of Labor Law Enforcement, etcetera, prepared and filed on October 23rd, 1950, a Proof of Debt in Bankruptcy to Claim Statutory Lien; that since the filing of said proof of debt affiant has received information which requires the correction of certain portions of said proof of debt; that this Amended Proof of Debt in Bankruptcy to Claim Statutory Lien, together with affiant's Amended Proof of Unsecured Debt in Bankruptcy (General), being filed concurrently herewith, are in place and instead of the aforesaid claim heretofore filed on October 23rd, 1950.

That Elliott Wholesale Co., a Corporation, against whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to said Division in the sum of Nine Hundred Eighty Three and 56/100ths Dollars (\$983.56); that the consideration of said debt is as follows:

Wages earned by the persons listed in the at-

tached exhibit, marked "Exhibit A," which is hereby referred to and made a part hereof as if here set forth in full; and that all of the persons listed in said exhibit have duly assigned in writing their said claims and statutory liens for labor and services to the Chief of the Division of Labor Law Enforcement of the Department of Industrial Relations of the State of California to collect under the authority vested in him by the laws of said State; that John F. Dalton is the duly appointed, qualified and acting Chief of said Division, and that under and by virtue of the laws of said State affiant is the duly authorized person to act for and on behalf of said John F. Dalton and to file this claim; that said Division is now the sole owner and holder of said claims and liens; that no part of said sum of Nine Hundred Eighty Three and 56/100ths Dollars (\$983.56) has been paid; that there are no set-offs nor counterclaims to the same; and deponent further says that no note has been received for such account nor any judgment rendered thereon.

Deponent claims a statutory lien herein on property and funds transferred or to be transferred by the assignee for the benefit of creditors to the trustee herein; and in connection with his claim for a statutory lien recites that on or about June 2nd, 1950, said bankrupt assigned his business to F. L. Farrell, as assignee for the benefit of creditors; that all the claims of the assignors of said Division of Labor Law Enforcement are claims for labor incurred within ninety (90) days prior to said assignment for the benefit of creditors; that

under Section 1204 of the California Code of Civil Procedure said claims are preferred claims and liens and must be paid by the assignee for the benefit of creditors as soon as the money with which to pay the same becomes available; that preferred claims and liens were filed, as provided by law, by all of said assignors with said assignee for the benefit of creditors; that said assignee had charge of the assets of said bankrupt prior to the filing of the petition in bankruptcy herein, out of which funds said Division's assignors were entitled to be paid.

Deponent claims a statutory lien upon said property and funds passed, or to be passed, to the trustee herein, under the laws of the State of California and of the United States, for the claims of all the assignors of said Division of Labor Law Enforcement.

/s/ R. LEE STE. FLEURE,
Deputy, Division of Labor Law Enforcement, Department of Industrial Relations, State of California.

Subscribed and sworn to before me this 23rd day of April, 1951.

J. E. LEWIS,
County Clerk.

[Seal] By /s/ L. R. HEAD,
Deputy Clerk.

EXHIBIT "A"

Name and Occupation	Date of Termination	Vacation Pay (one fourth)	Severance Pay	Regular Wages	Total Statutory Lien
Vincent L. Nicoletti, Warehouse manager.....	5/26/50	\$16.87			\$ 16.87
Alec W. Robinson, Route salesman	5/26/50	52.15	\$74.50		126.65
Minna Wilcox Bookkeeper	6/ 2/50	30.02			30.02
Leo P. Jensen, Driver-salesman	6/ 1/50	37.25	74.50		111.75
Bert G. Donaldson, manager, wholesale grocery	6/ 1/50			\$200.00	200.00
Ronald A. Grell, Route supervisor	5/26/50	42.25	84.50		126.75
Elton N. Keller, Salesman	5/26/50	51.38			51.38
Elbert W. Whitney, Warehouse foreman	6/ 2/50	35.20	84.60		119.80
James F. Bond, Driver-salesman	5/29/50	37.25	74.50		111.75
Mario Pezzati, Truck driver	5/19/50	33.75	54.84		88.59
Total					<u>\$983.56</u>

[Endorsed]: Filed April 24, 1951, Referee.

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF
LAW ON OBJECTIONS TO CLAIMS OF
DIVISION OF LABOR LAW ENFORCE-
MENT

This matter having come on for hearing on the verified objections to claims of James M. McCloskey, trustee herein, on the 4th day of May, 1951, at the hour of 10:00 A.M. thereof, and the trustee having appeared by and been represented through his

counsel, Craig, Weller & Laugharn, by C. E. H. McDonnell and the Division of Labor Law Enforcement, Department of Industrial Relations, State of California having appeared through and been represented by Pauline Nightingale, Edward M. Belasco, and Leon H. Berger, by Leon H. Berger, and evidence both oral and documentary having been offered, the Referee being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law, on the said objections:

Findings of Fact

I.

The Referee finds that the Elliott Wholesale Grocery Company, a Corporation, made a general assignment for benefit of creditors on June 2, 1950; that an involuntary petition in bankruptcy was filed against the said Elliott Wholesale Grocery Company on July 21, 1950, and that thereafter the said Elliott Wholesale Grocery Company was adjudicated a bankrupt; that on September 8, 1950, James M. McCloskey was elected Trustee in bankruptcy for the Elliott Wholesale Grocery Company, a bankrupt, immediately filed his bond and qualified; that from and after qualification the said James M. McCloskey has continued at all times, and does now, act as trustee in the said bankruptcy.

II.

The Referee finds that on October 23, 1950, the Division of Labor Law Enforcement, Department of Industrial Relations, State of California, filed a

claim in the bankruptcy proceedings of the Elliott Wholesale Grocery Company on behalf of a number of persons who claimed rights as employees of the bankrupt corporation; that such claims were aggregated into a single claim for \$580.39; that thereafter on April 24, 1951, the Division of Labor Law Enforcement, Department of Industrial Relations, State of California, filed an "Amended Proof of Debt in Bankruptcy to Claims Statutory Lien" on behalf of the same claimants, aggregating their claims into a single claim for \$983.56; that all of the said claims were asserted to be entitled to priority under the Provisions of Sec. 1204 of the California Code of Civil Procedure; that of the claim so filed \$447.34 was asserted due as "severance pay."

III.

The Referee finds that on April 10, 1951, the trustee, James M. McCloskey, filed objections to the original claims filed by the Division of Labor Law Enforcement, Department of Industrial Relations, State of California, which objections came on for hearing on May 4, 1951, at the hour of 10:00 A.M.; that at that time the objections filed by the Trustee were, by Stipulation, applied to and allowed to stand against the "Amended Proof of Debt in Bankruptcy to Claims Statutory Lien" filed by the Division of Labor Law Enforcement in the interim.

IV.

The Referee finds that the following persons are claiming the indicated sums as "severance pay":

Alec W. Robinson, \$74.50; Leo P. Jensen, \$74.50; Ronald A. Grell, \$84.15; Elbert W. Whitney, \$84.60; James F. Bond, \$74.50; Mario Pezzati, \$68.50; that all of these claims are aggregated in "Amended Proof of Debt in Bankruptcy to Claims Statutory Lien" filed by the Division of Labor Law Enforcement and that priority under Section 1204 of the California Code of Civil Procedure is asserted for all such "severance pay" claims.

V.

The Referee finds that the following claimants were employed by the Bankrupt Corporation until the dates of their discharge which are as follows: Alec W. Robinson, May 26, 1950; Leo P. Jensen, June 1, 1950; Ronald R. Grell, May 26, 1950; Elbert W. Whitney, June 2, 1950; James F. Bond, May 29, 1950; Mario Pezzati, May 19, 1950; that all of these claimants were discharged because of the cessation of operations by the bankrupt corporation shortly prior to the assignment for benefit of creditors; that none of these claimants resigned or quit their jobs with the bankrupt corporation; that none of these claimants were discharged for dishonesty, drinking on the job, or gross insubordination; that none of these claimants received either one week's notice of their discharge or in lieu thereof one week's "severance pay."

VI.

The Referee finds that all employees claiming severance pay were employed under a union con-

tract between the bankrupt corporation and a union to which all claiming employees belonged; that the said contract was in effect up to the date of the assignment for benefit of creditors by the bankrupt corporation; that Article 3, Section 5, of the said Union Contract provided as follows:

“Except for dishonesty, drinking on the job, or gross insubordination, the employer shall give one week’s notice or one week’s pay in lieu thereof when discharging or laying off an employee. Employees desiring to quit their job shall give the employer one week’s notice.”

Conclusions of Law

I.

That there was a valid, existing contract between the bankrupt corporation and the labor union to which its employees belonged in existence to June 2, 1950; that said contract required payment of one week’s “severance pay” when employees covered thereby were discharged or laid off for other reasons than dishonesty, drinking on the job or gross insubordination.

II.

That the bankrupt corporation became indebted for one week’s “severance pay” to its employees when it laid them off without notice because of cessation of business operation.

III.

That the indebtedness of the bankrupt corporation to its employees for one week’s “severance

pay” was in the nature of liquidated damages for breach of the employment contract; that the indebtedness for “severance pay” is not for “wages and salaries” * * * “for personal services rendered” and is not entitled to a preferred position under the provisions of Section 1204 of the California Code of Civil Procedure.

Dated May 18, 1951.

/s/ DAVID B. HEAD,
Referee in Bankruptcy.

Received May 10, 1951, Referee.

[Endorsed]: Filed May 18, 1951, Referee.

[Title of District Court and Cause.]

ORDER ON OBJECTION TO CLAIM

This matter having come on for hearing on the verified objection to claim of James M. McCloskey, the trustee herein on the 4th day of May, 1951, at the hour of 10:00 a.m. thereof, and the trustee having appeared through and been represented by his counsel Craig, Weller & Laugharn by C. E. H. McDonnell, and the Division of Labor Law Enforcement, Department of Industrial Relations, State of California having appeared through and been represented by its counsel Pauline Nightingale, Edward M. Belasco, and Leon H. Berger, by Leon H. Berger, and it appearing that the original claim filed by the Division of Labor Law Enforcement,

bearing court number 80, in the amount of \$580.39 had been amended by the filing of another claim covering the same labor claimant, by the Division of Labor Law Enforcement in a total amount of \$983.56, and it further appearing that in addition to the claim in the amount of \$983.56, for which labor priority is asserted, that the Division of Labor Law Enforcement had also filed on behalf of a number of the labor claimants involved in the objection of the Trustee here a general unsecured claim for which no priority was asserted, and it being determined that nothing in the orders made here by the Referee would affect or alter the said general unsecured claim filed by the Division of Labor Law Enforcement, and that any general unsecured portion of the statutory lien claim would attach to and be in addition to any unsecured sums claimed otherwise in other claims, and evidence both oral and documentary having been offered, and the Referee having duly made his Findings of Fact and Conclusions of Law concerning the rights asserted by a number of the labor claimants involved in the general claim filed by the Division of Labor Law Enforcement to "severance pay," and based on the said Findings of Fact and Conclusions of Law so far as these orders affect severance pay priority, and the Referee being fully advised in the premises

Now, Therefore,

It Is Ordered that the claim of Vincent L. Nicoletti, in the amount of \$16.87 which is a portion of the hereinbefore described total claim of the Division of Labor Law Enforcement be and the same hereby

is allowed as a claim entitled to priority under C.C.P. 1204 and

It Is Further Ordered that the claim filed through the Division of Labor Law Enforcement by Alec W. Robinson in the amount of \$128.65 be and the same hereby is allowed in the sum and to the amount of \$52.15 as a statutory lien claim under C.C.P. 1204, and to the amount of \$74.50, which is severance pay, as a general unsecured claim and

It Is Further Ordered that the claim filed by Minna Wilcox through the Division of Labor Law Enforcement be and the same hereby is allowed in the sum of \$30.02 as a statutory lien claim under the provisions of C.C.P. 1204 and

It Is Further Ordered that the claim filed by Leo P. Jensen with the Division of Labor Law Enforcement, which is embodied in their total claim as said here before, be and the same hereby is allowed in the amount and to the extent of \$37.25 as a claim entitled to priority under C.C.P. 1204, and in the amount and to the extent of \$74.50 as a general unsecured claim for severance pay; and

It Is Further Ordered that the claim filed by Bert G. Donaldson with the Division of Labor Law Enforcement, and which is embodied in their priority claim as aforesaid be and the same hereby is allowed in the amount and to the extent of \$200.00 as a general unsecured claim; and

It Is Further Ordered that the claim filed by Ronald A. Grell with the Division of Labor Law Enforcement and which is embodied in their summary claim as set forth above be and the same

hereby is allowed in the amount and to the extent of \$42.25 as a claim entitled to priority under C.C.P. 1204, and to the amount of \$84.50 as a general unsecured claim for severance pay, and

It Is Further Ordered that the claim filed herein by Elton N. Keller with the Division of Labor Law Enforcement and which is embodied in their summary claim as said before, be and the same hereby is allowed in the amount of and to the extent of \$51.38 as a claim entitled to priority under C.C.P. 1204; and

It is Further Ordered that the claim filed by Elbert W. Whitney in the amount of \$119.80 with the Division of Labor Law Enforcement, and which is embodied in the summary claim of the Division of Labor Law Enforcement as said before be and the same hereby is allowed in the amount and to the extent of \$35.20 as a claim entitled to priority under C.C.P. 1204, and in the amount and to the extent of \$70.50 as a general unsecured claim for severance pay; and

It Is Further Ordered that the claim filed by James F. Bond with the Division of Labor Law Enforcement in the amount of \$111.75, and which is embodied in the said summary claim of the Division of Labor Law Enforcement, be and the same hereby is allowed in the amount of and to the extent of \$37.25 as a claim entitled to priority under C.C.P. 1204 and in the amount and to the extent of \$74.50 as a general unsecured claim for severance pay and

It is Further Ordered that the claim filed herein by Mario Pezzati with the Division of Labor Law

Enforcement in the amount of \$88.59, and which is a portion of the summary claim filed by the Division of Labor Law Enforcement in the within proceedings as aforesaid, be and the same hereby is allowed in the amount and to the extent of \$33.75 as a claim entitled to priority under C.C.P. 1204, and in the amount and to the extent of \$68.50 as a general unsecured claim for severance pay.

Dated May 17, 1951.

/s/ DAVID B. HEAD,
Referee in Bankruptcy.

[Endorsed]: Filed May 17, 1951.

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S
ORDER DENYING STATUTORY LIEN
CLAIM UNDER SECTION 67-b OF THE
BANKRUPTCY ACT

Comes now the Division of Labor Law Enforcement, Department of Industrial Relations, State of California, by and through its attorneys, Pauline Nightingale, Edward M. Belasco and Leon H. Berger, by Leon H. Berger, and files this, its petition for review of those certain orders made and entered on May 17, 1951, by Honorable David B. Head, Referee in Bankruptcy, wherein said referee ordered that the objections of James M. McCloskey, trustee in bankruptcy herein, to the statutory lien

claim of the Division of Labor Law Enforcement, Department of Industrial Relations, State of California, be sustained with respect to \$74.50 of the assigned statutory lien claim of Alec W. Robinson; \$74.50 of the assigned statutory lien claim of Leo P. Jensen; \$84.50 of the assigned statutory lien claim of Ronald A. Grell; \$70.50 of the assigned statutory lien claim of Elbert W. Whitney; \$74.50 of the assigned statutory lien claim of James F. Bond; and \$68.50 of the assigned statutory lien claim of Mario Pezzati, each of which was a claim for severance pay, and ordered each of said claims be allowed only as general unsecured claims.

With respect to the foregoing, on or about May 17, 1951, The Honorable David B. Head, Referee in Bankruptcy, signed his Findings of Fact and Conclusions of Law in the above-entitled matter, and thereupon on said date made and entered his Order on the objection of the trustee to the claim of the petitioner, said order reading in part as follows:

“It Is Further Ordered that the claim filed through the Division of Labor Law Enforcement by Alec W. Robinson in the amount of \$128.65 be and the same hereby is allowed in the sum and to the amount of \$52.15 as a statutory lien claim under C.C.P. 1204, and to the amount of \$74.50, which is severance pay, as a general unsecured claim and

“It Is Further Ordered that the claim filed by Leo P. Jensen with the Division of Labor Law Enforcement, which is embodied in their total claim as said here before, be and the

same hereby is allowed in the amount and to the extent of \$37.25 as a claim entitled to priority under C.C.P. 1204, and in the amount and to the extent of \$74.50, as a general unsecured claim for severance pay; and

“It Is Further Ordered that the claim filed by Ronald A. Grell with the Division of Labor Law Enforcement and which is embodied in their summary claim as set forth above be and the same hereby is allowed in the amount and to the extent of \$42.25 as a claim entitled to priority under C.C.P. 1204, and to the amount of \$84.50 as a general unsecured claim for severance pay, and

“It Is Further Ordered that the claim filed by Elbert W. Whitney in the amount of \$119.80 with the Division of Labor Law Enforcement, and which is embodied in the summary claim of the Division of Labor Law Enforcement as said before be and the same hereby is allowed in the amount and to the extent of \$35.20 as a claim entitled to priority under C.C.P. 1204, and in the amount and to the extent of \$70.50 as a general unsecured claim for severance pay; and

“It Is Further Ordered that claim filed by James F. Bond with the Division of Labor Law Enforcement in the amount of \$111.75, and which is embodied in the said summary claim of the Division of Labor Law Enforcement, be and the same hereby is allowed in the amount of and to the extent of \$37.25 as a claim

entitled to priority under C.C.P. 1204 and in the amount and to the extent of \$74.50 as a general unsecured claim for severance pay, and

“It Is Further Ordered that the claim filed herein by Mario Pezzati with the Division of Labor Law Enforcement in the amount of \$88.59, and which is a portion of the summary claim filed by the Division of Labor Law Enforcement in the within proceedings as aforesaid, be and the same hereby is allowed in the amount and to the extent of \$33.75 as a claim entitled to priority under C.C.P. 1204, and in the amount and to the extent of \$68.50 as a general unsecured claim for severance pay.

“Dated May 17, 1951.

“/s/ DAVID B. HEAD,

“Referee in Bankruptcy.”

That the foregoing orders were based upon the Findings of Fact and Conclusions of Law of the Referee heretofore made and entered by him in this proceeding and this Petition for Review is based upon the following grounds and errors with respect to the orders set forth above:

I.

That the Referee in Bankruptcy erred in ordering that the objections of the Trustee be sustained to the statutory lien claim for severance pay of the Division of Labor Law Enforcement of the Department of Industrial Relations of the State of California, as assignee of Alec W. Robinson to the extent of

\$74.50; as assignee of Leo P. Jensen to the extent of \$74.50; as assignee of Ronald A. Grell to the extent of \$84.50; as assignee of Elbert W. Whitney to the extent of \$70.50; as assignee of James F. Bond to the extent of \$74.50; and as assignee of Mario Pezzati to the extent of \$68.50.

II.

That the Referee in Bankruptcy erred in ordering that the Division of Labor Law Enforcement of the Department of Industrial Relations of the State of California does not have a statutory lien under Section 67 (b) of the Bankruptcy Act with respect to severance pay due to its assignors and in ordering that said claims be allowed only as general unsecured claims.

III.

That the Referee in Bankruptcy erred in basing his orders upon a conclusion of law "that the indebtedness of the bankrupt corporation to its employees for one week's 'severance pay' was in the nature of liquidated damages for breach of the employment contract; that the indebtedness for 'severance pay,' is not for 'wages and salaries * * * for personal services rendered' and is not entitled to a preferred position under the provisions of Section 1204 of the California Code of Civil Procedure."

IV.

That the Referee in Bankruptcy erred in basing his orders upon a conclusion of law that severance

pay provided for in a union contract reading as follows,

“Except for dishonesty, drinking on the job, or gross insubordination, the employer shall give one week’s notice or one week’s pay in lieu thereof when discharging or laying off an employee. Employees desiring to quit their job shall give the employer one week’s notice.”

did not, where the employees were discharged and the notice by the employer was not given, constitute wages or salary entitled to priority under the provisions of Section 1204 of the Code of Civil Procedure of the State of California.

V.

That the Referee in Bankruptcy erred in making his orders in that he did not conclude as a matter of law that severance pay, becoming due and payable under the terms of a collective bargaining contract within ninety (90) days prior to an assignment for the benefit of creditors, constituted wages for personal services within the provisions of Section 1204 of the Code of Civil Procedure of the State of California and entitled to a lien thereunder.

Wherefore, your petitioner prays that the said orders be reviewed and reversed, and that the Referee be directed to make and enter his orders allowing as statutory lien claims the claims for severance pay of the Division of Labor Law Enforcement of the Department of Industrial Relations of the State of California, and for such other

and further relief, decrees and orders as the Court may deem proper.

Dated May 25, 1951.

PAULINE NIGHTINGALE,
EDWARD M. BELASCO, and
LEON H. BERGER,

By /s/ LEON H. BERGER,
Attorneys for Petitioner, Division of Labor Law
Enforcement, Etc.

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

Gladys Duncan, being first duly sworn, says that affiant is a citizen of the United States and a resident of this County, is over 18 years of age and not a party to the above-entitled matter, and that affiant's business address is 503 Calif. State Bldg., 217 W. 1st St., Los Angeles 12, California;

That on May 28, 1951, affiant served a copy of the attached Petition for Review of Referee's Order Denying Statutory Lien Claim Under Section 67-b of the Bankruptcy Act on the following named persons by placing a true copy of said papers in a sealed envelope with postage fully prepaid, and depositing the envelope in the United States mail in the post office of this City addressed to the last known address, to which there is regular daily communication by mail, as follows: Craig, Weller &

Laugharn, and John K. Hass, Attorneys for Trustee,
111 West 7th Street, Room 817, Los Angeles 14,
California.

/s/ GLADYS DUNCAN.

Subscribed and sworn to before me this 28th day
of May, 1951.

[Seal] /s/ MARGUERITE REESE,
Notary Public In and for the County of Los An-
geles, State of California.

My commission expires June 15, 1951.

[Endorsed]: Filed May 28, 1951, Referee.

[Endorsed]: Filed June 15, 1951, U.S.D.C.

[Title of District Court and Cause.]

MEMORANDUM DECISION

Appearances:

For the Petitioner:

PAULINE NIGHTINGALE,
EDWARD M. BELASCO,
LEON H. BERGER.

For the Trustee:

CRAIG, WELLER & LAUGHRAN,
C. E. H. McDONNELL.

Yankwich, District Judge:

The petition to review the Order of the Referee,
dated May 17, 1951, denying priority for severance

pay due to certain employees of the bankrupt, heretofore heard, argued and submitted, is now decided as follows:

The Order of the Referee dated May 17, 1951, is hereby reversed and the Referee is directed to allow the rejected claims as a preferred claim for wages, as follows:

Alec W. Robinson.....	\$74.50
Leo P. Jensen.....	74.50
Ronald A. Grell.....	84.50
Elbert W. Whitney.....	70.50
James F. Bond.....	74.50
Mario Pezzati.....	68.50

Comment

An involuntary petition was filed against Elliott Wholesale Grocery Company of Santa Barbara, California on July 21, 1950. An adjudication was made on September 8, 1950. Prior to that time, however, on June 2, 1950, the bankrupt made a general assignment for the benefit of creditors. In the bankruptcy proceedings, six employees, represented by the Division of Law Enforcement, Department of Industrial Relations of the State of California, claimed severance pay. The discharge dates were within the ninety-day period from the date of the general assignment, the earliest date being May 19, 1950. The discharge resulted from the assignment, and not by reason of any misconduct of any of the employees.

In the contract between the bankrupt and the

union to which the employees belonged, it was provided:

“Except for dishonesty, drinking on the job, or gross insubordination, the employer shall give one week’s notice or one week’s pay in lieu thereof when discharging or laying off an employee. Employees desiring to quit their job shall give the employer one week’s notice.”

No such notice was given to any of the employees.

A preferred claim status was claimed both under the Bankruptcy Act (11 U.S.C.A., Sec. 107 (4) (b) and Section 1204 of the Code of Civil Procedure of California, which gives a preferred status to wages earned within ninety days prior to assignment of creditors. The Referee disallowed the claim. He took the view, expressed in his certificate, that the contract provisions for severance pay did not come within the purview of Section 1204 of the California Code of Civil Procedure, which granted priority to “wages or salaries * * * for personal services rendered” within the ninety-day period, because they were “actually provisions for liquidated damages.”

The Referee erred in this interpretation. The provision in the contract clearly indicates that the severance pay is in lieu of wages. In effect, it says that the employee shall be entitled to a week’s notice of discharge. When such notice is not given, or cannot be given because, as happened here, the employer ceased business when it made the assignment for the benefit of its creditors, the employee

is entitled to the week's wages corresponding to the week's notice. (See, *Gapar v. United Milk Products of California*, 1944, 62 C.A. (2) 540.) This provision is in line with the policy of the law of California, which assures to the employee immediate payment of wages upon discharge. (California Labor Code, Section 201.) Even an employee who quits must receive his wages not later than 72 hours after quitting. If he gives the 72 hours' notice, then he is entitled to his wages at the time of the quitting. (California Labor Code, Sec. 202.)

Provisions of this character, whether they call for wages or discharge without notice, or for payment for earned vacation periods, are generally considered wages—that is, compensation for services rendered, which, through no fault of the employee, he was not permitted to render. (See, *In re Dexter*, 1907, 1 Cir., 158 Fed. 788; *In re Collin*, 1937, D.C. N.Y., 18 F. Supp. 848; *In re Herbert Candy Company*, 1942, D.C. Pa., 43 F. Supp. 588, which treats the commissions paid to traveling salesmen as wages entitled to priority under the Bankruptcy Act.)

The vacation pay cases are very helpful. As Judge August N. Hand said:

"A vacation with pay is in effect additional wages. It involves a reasonable arrangement to secure the well being of employees and the continuance of harmonious relations between employer and employee. The consideration for the contract to pay for a week's vacation had been furnished, that is to say, one year's service had been rendered prior to June 1, so that the

week's vacation with pay was completely earned and only the time of receiving it was postponed. If the employer had discharged the employee wrongfully after the latter had done the work necessary to earn a vacation he could not be deprived of the benefits due him." (In re Willow Cafeterias, Inc., 1940, 2 Cir., 111 F (2) 420, 432.) (Emphasis added.)

(And see, Siaskiewicz v. General Electric Co., 1948, 2 Cir., 166 F (2) 463, 465-466; McLaughlin v. Union Switch & Signal Company, 1948, 3 Cir., 166 F (2) 46, 50.)

In Re Public Ledger, 1947, 3 Cir., 161 F (2) 762, 770, in an opinion written by Judge Albert Lee Stephens of this Circuit, "severance pay" is denominated wages. We quote from the opinion:

"The claims under the layoff provision of the contract are for wages. The provision protects against a sudden, unexpected and unprepared for stoppage of wages. It provides that knowledge of a break in the continuity of work and the consequent lack of pay shall be given the employee and it is the employer's duty to give it. If he does not give it, the wage continues unaffected for the term of the required notice. Whether the layoff occurs through bankruptcy or any other cause does not affect the validity of this wage requirement. For the lack of a better term, we call this contractual arrangement one for severance pay." (Emphasis added.)

These rulings also find support in the income tax cases which consider severance pay additional compensation. (See, 1 Mertens, Law of Federal Income Taxation, 1942, Sec. 8.08; *Botchford v. Commissioner*, 1936, 9 Cir., 81 F (2) 914; *Poorman v. Commissioner*, 1942, 9 Cir., 131 F (2) 946; *Van Dusen v. Commissioner*, 1948, 9 Cir., 166 F (2) 647; and see the writer's opinion in *Dasteel v. Rogan*, 1941, D.C. Cal., 41 F. Supp. 836.)

The principles declared in these cases are a realistic approach to the problem. Through collective bargaining, the employee protects himself against sudden dismissal without cause, by requiring a definite notice. In the case before us, the minimum notice is one week. When the employer does not give the notice, either through voluntary choice or by force of circumstances, he is required to pay a week's wages. The wages are compensation for the week. The right to it is guaranteed in the contract. But the right to receive it is postponed to the time when the notice was due and was not given.

So the severance pay is not earned, as the Trustee argues, at the time the contract of employment is entered into, but at the time the week's notice is due. In effect, through the contract, the employer says to the employee, "If I discharge you without cause, I shall give you a week's notice. If I choose not to give you the notice, or circumstances, such as my going out of business, prevent me from giving it to you, I shall pay you the week's wages."

So the payments claimed here are for wages

earned for the week. And the Referee was wrong in denying them preferred status.

Hence the ruling above made.

Dated this 18th day of July, 1951.

/s/ LEON R. YANKWICH,
Judge.

[Endorsed]: Filed July 15, 1951.

In the United States District Court, Southern
District of California, Central Division

No. 50,151-Y

In the matter of
ELLIOTT WHOLESALE GROCERY CO., a Cor-
poration,

Bankrupt.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

The petition of the Division of Labor Law Enforcement, Department of Industrial Relations, State of California, to review the order of the Honorable David B. Head, Referee in Bankruptcy, dated May 17, 1951, denying priority for severance pay due to certain employees of the bankrupt having come on regularly for hearing before this Court on Monday, July 16, 1951, the petitioner appearing by Pauline Nightingale, Edward M. Belasco and Leon H. Berger, by Leon H. Berger, and the Trus-

tee in Bankruptcy, James M. McCloskey, appearing by Craig, Weller and Laugharn and C. E. H. McDonnell; and the cause having heretofore been heard, argued and submitted, the Court now makes its findings of fact, conclusions of law and order as follows:

Findings of Fact

The findings of fact of the Referee are hereby adopted as the findings of fact of the Court, and the Court further finds as a fact that the Trustee has stipulated and agreed that petitioner's claims for severance pay be considered as claims for priority wages under section 64a (2) of the Bankruptcy Act as well as statutory lien claims under section 67b of the Bankruptcy Act.

Conclusions of Law

I.

Petitioner's claims for severance pay constitute wages or salaries for personal services rendered within 90 days prior to the assignment for the benefit of creditors as provided for by section 1204 of the California Code of Civil Procedure and entitled to allowance in this bankruptcy proceeding as statutory liens under the provisions of section 67b of the Bankruptcy Act.

II.

Petitioner's claim for severance pay constitute wages which have been earned within three months before the date of the commencement of this bankruptcy proceeding and entitled to allowance as priority wages under the provisions of section 64a (2) of the Bankruptcy Act.

Order

It Is Hereby Ordered, Adjudged and Decreed that the order of the Referee, dated May 17, 1951, wherein the Referee allowed petitioner's claims for severance pay as general claims only, is hereby reversed and the Referee is directed to allow such claims for severance pay as priority claims for wages under sections 64a (2) of the Bankruptcy Act and as statutory lien claims under 67b of the Bankruptcy Act, such claims being more specifically as follows:

Alec W. Robinson.....	\$74.50
Leo P. Jensen.....	74.50
Ronald A. Grell.....	84.50
Elbert W. Whitney.....	70.50
James F. Bond.....	74.50
Mario Pezzati	68.50

Petitioner is allowed its costs upon this review.

Dated July 25, 1951.

/s/ LEON R. YANKWICH,
Judge.

Approved as to Form:

CRAIG, WELLER &
LAUGHARN,

By /s/ C. E. H. McDONNELL,
Attorneys for Trustee.

[Endorsed]: Filed July 26, 1951.

Docketed and Entered August 10, 1951.

[Title of District Court and Cause.]

REFEREE'S SUPPLEMENTAL
CERTIFICATE ON REVIEW

To the Honorable Judges of the United States District Court, Southern District of California, Central Division:

I, David B. Head, Referee in Bankruptcy, further certify the following documents which have been requested to be added to the Referee's Certificate filed herein on June 15, 1951:

1. Order Approving Trustee's Bond.
2. Stipulation dated May 17, 1951.
3. Proof of Wage Debt of William L. Jackson.
4. Amended Proof of Wage Debt of William L. Jackson.

Dated November 21, 1951.

Respectfully submitted,

/s/ DAVID B. HEAD,

Referee in Bankruptcy.

[Title of District Court and Cause.]

ORDER APPROVING TRUSTEE'S BOND

At Santa Barbara, in said district, on the 18th day of Sept., 1950.

The above-named Elliott Wholesale Co., a Corp., having been duly adjudged a bankrupt on a petition filed by (or against) him on the day of , 19..; and James M. McCloskey, of Santa Barbara, in said district, having been duly appointed trustee of the estate of said bankrupt, and having duly qualified by giving a bond with sufficient sureties for the faithful performance of his official duties in the amount fixed by the order of this court, viz., dollars;

It Is Ordered that the said bond be, and it hereby is, approved.

/s/ DAVID B. HEAD,

Referee in Bankruptcy.

[Endorsed]: Filed September 18, 1950, Referee.

[Title of District Court and Cause.]

STIPULATION

Whereas, on the 4th day of May, 1951, at the hour of 10:00 A.M. thereof there was a hearing on the Objection of James M. McCloskey, trustee in the above-captioned bankruptcy, to the claim of William L. Jackson, bearing Court number 151 in the amount of \$417.50, and

Whereas, there has heretofore been made and entered an Order of the above-captioned court allowing the claim of the said William L. Jackson in the amount and to the extent of \$67.50 as entitled to priority under C. C. P. 1204 and in the amount and to the extent of \$350.00 as a general unsecured claim, and

Whereas, it appears from the face of the said claim that the claim of William L. Jackson contains the sum of \$75.00 as "severance pay" alleged to be due the said William L. Jackson by reason of his dismissal without notice as required in the Union Contract between the union to which the said William L. Jackson belonged and the Elliott Wholesale Grocery Company, and

Whereas, the Court has heretofore made and entered its Findings of Fact and Conclusions of Law directed towards its rejection of "severance pay" in other claims in the within proceedings as prior, and

Whereas, through inadvertence the claim of William L. Jackson was not embodied in the said Findings of Fact and Conclusions of Law as aforesaid,

It Is Hereby Stipulated by and between the undersigned that the Trustee herein, James M. McCloskey, will hold separate and retain in his possession the sum of \$75.00 pending a final determination of whether or not "severance pay" is entitled to a prior position under the provisions of C. C. P. 1204, and

It Is Further Stipulated by and between the undersigned that in event of no review being taken

from the heretofore said Findings of Fact and Conclusions of Law and Orders in other claims for "severance pay" the trustee after the lapse of ten days from the date of the entrance of the said Order, and on the said Order becoming final without the filing of a petition for review, he will no longer be obligated to hold separate the sum of \$75.00 for the said William L. Jackson.

Dated May 11, 1951.

CRAIG, WELLER &
LAUGHARN,

By /s/ C. E. H. McDONNELL,
Attorneys for Trustee.

PAULINE NIGHTINGALE,
EDWARD M. BELASCO, and
LEON H. BERGER,

By /s/ LEON H. BERGER,
Attorneys for William L.
Jackson.

[Endorsed]: Filed May 17, 1951, Referee.

[Title of District Court and Cause.]

PROOF OF WAGE DEBT

At San Luis Obispo, California, in said District of California, on the day of, 1950, came William L. Jackson, of San Luis Obispo, County of San Luis Obispo, in said District of California, and made oath, and says that Elliott Wholesale Co., a Corporation, the person by (against) whom a petition for Adjudication of Bankruptcy has been filed, was at and before the filings of said petition, and still is, justly and truly indebted to said deponent, in the sum of Four Hundred Seventeen and 50/100ths Dollars (\$417.50); that the consideration of said debt is as follows: Wages earned as a route salesman, the particular kind of work done being route selling of goods work, between the dates of, 1948, to May 30th, 1950, both dates inclusive, being one week severance pay at the rate of \$75.00 per week, plus 3 weeks vacation pay or \$225.00 plus 7/12ths of a year vacation pay of \$87.50 plus 2 days salary or \$30.00, total \$417.50 based upon Union Contract, that no part of said debt has been paid; that there are no set-offs or counterclaims to the same; and that deponent has not, nor has any person by his order, or to his knowledge or belief for his use, had or received any manner of security for said debt whatever.

And deponent further says that no note has been

received for such account, nor any judgment rendered thereon.

/s/ WILLIAM L. JACKSON,
Creditor.

William L. Jackson,
673 Santa Rosa Street,
San Luis Obispo, California.
Social Security No. 066-01-9894.
No. of Withholding
Tax Exemptions Claimed

Subscribed and sworn to before me this 11th day of December, 1950.

[Seal] A. E. MALLAGH,
County Clerk,

By /s/ MARGARET MUZIO,
Deputy Clerk.

Assignment of Claim to State Labor Commisisoner

I hereby assign my claim, as described in this document, to the Labor Commissioner of the State of California, and authorize him to take such steps as he shall deem necessary to collect same, including attendance at all meetings of creditors, as my representative.

I authorize him to receive all payments, and direct that any and all notices may be forwarded to him.

Dated the 11th day of December, 1950.

/s/ WILLIAM L. JACKSON.

Acknowledged before me this 11th day of December, 1950.

[Seal] A. E. MALLAGH,
County Clerk,

By /s/ MARGARET MUZIO,
Deputy Clerk.

[Endorsed]: Filed December 13, 1950, Referee.

[Title of District Court and Cause.]

AMENDED PROOF OF WAGE DEBT

To Claim Statutory Lien.....\$161.25
And General Claim.....\$256.25

At San Luis Obispo, California, in said District of California, on the 25th day of April, 1951, came William L. Jackson, of San Luis Obispo, County of San Luis Obispo, in said District of California, and made oath, and says that this amended claim is being filed in the place and stead of the claim filed by affiant in this proceeding on December 13th, 1950; that Elliott Wholesale Co., a Corporation, the Corporation against whom a petition for Adjudication of Bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent, in the sum of Four Hundred Seventeen and 50/100ths Dollars (\$417.50); that the consideration of said debt is as follows: Wages earned as a Route Salesman, the

particular kind of work done being route selling of goods work, between the dates of March 2nd, 1950, to June 1st, 1950, both dates inclusive, being one week severance pay at the rate of \$75.00 per week, plus 3 weeks vacation pay or \$225.00, plus 7/12ths of year vacation pay of \$87.50 plus 2 days salary or \$30.00, total \$417.50, based upon Union Contract, that no part or said debt has been paid; that there are no setoffs or counterclaims to the same; and that deponent has not, nor has any person by his order, or to his knowledge or belief for his use, had or received any manner of security for said debt whatever.

And deponent further says that no note has been received for such account, nor any judgment rendered thereon.

That \$161.25 of the claim of affiant is a claim for labor incurred within ninety (90) days prior to said assignment for the benefit of creditors; that under Section 1204 of the California Code of Civil Procedure said claim is a preferred claim and lien and must be paid by the assignee for the benefit of creditors as soon as the money with which to pay the same becomes available; that said assignee had charge of the assets of said bankrupt prior to the filing of the petition in bankruptcy herein, out of which funds said affiant was entitled to be paid.

Deponent claims a statutory lien upon said property and funds passed, or to be passed, to the Trustee herein, under the laws of the State of California

and of the United States, for the claim of said deponent in said sum of \$161.25.

/s/ WILLIAM L. JACKSON,
Creditor.

673 Santa Rosa St.,
San Luis Obispo, Calif.

Social Security No. 066-01-9894.

Number of Withholding Tax Exemptions Claimed, 4.

Subscribed and sworn to before me this 25th day
of April, 1951.

[Seal] A. E. MALLAGH,
County Clerk.

/s/ MARGARET MUZIO,
Deputy Clerk.

Received April 27, 1951.

[Endorsed]: Filed July 21, 1951.

[Title of District Court and Cause.]

ORDER TO AUGMENT RECORD

It appearing that on November 21, 1951, the Honorable David B. Head, Referee in Bankruptcy, filed his "Referee's Supplemental Certificate on Review," adding to his certificate filed June 15, 1951, the following documents:

1. Order Approving Trustee's Bond.
2. Stipulation dated May 17, 1951.
3. Proof of Wage Debt of William L. Jackson.

4. Amended Proof of Wage Debt of William L. Jackson, which documents were not a portion of the original Referee's Certificate on Review; and

It further appearing that the hereinbefore described documents are necessary to complete the record on Appeal #13102, entitled James M. McCloskey, Trustee, etc., vs. Division of Labor Law Enforcement, State of California, presently pending before the United States Court of Appeals for the Ninth Circuit.

Now, Therefore,

It Is Ordered that the record herein be and the same hereby is augmented by the inclusion of the following described documents:

1. Order Approving Trustee's Bond.
2. Stipulation dated May 17, 1951.
3. Proof of Wage Debt of William L. Jackson.
4. Amended Proof of Wage Debt of William L. Jackson.

Dated November 30, 1951.

/s/ LEON R. YANKWICH,
Judge U. S. Dist. Court.

[Endorsed]: Filed November 30, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages contain the original Involuntary Petition in Bankruptcy; Order of General Reference; Adjudication of Bankruptcy; Referee's Certificate on Review and Objections of Trustee to Claim of the Division of Labor Law Enforcement, Department of Industrial Relations, State of California, Original claim filed by the Division of Labor Law Enforcement, Department of Industrial Relations, State of California, Amended Claim filed by the Division of Labor Law Enforcement, Department of Industrial Relations, State of California, Findings of Fact, and Conclusions of Law, Order on Trustee's Objection to the claims of Division of Labor Law Enforcement, Department of Industrial Relations, State of California, and Petition for Review certified therewith; Referee's Supplemental Certificate on Review with Order Approving Trustee's Bond, Stipulation dated May 17, 1951, Proof of Wage Debt of William L. Jackson and Amended Proof of Wage Debt of William L. Jackson certified therewith; Memorandum Decision; Findings of Fact, Conclusions of Law and Order; Appellant's Designation of the Record on Appeal; Affidavit of Service and Order to Augment Record which is the record which has been designated on the petition of the trustee for appeal to

the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 4th day of December, A.D. 1951.

[Seal] EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13102. United States Court of Appeals, for the Ninth Circuit. James M. McCloskey, as Trustee in Bankruptcy for the Estate of Elliott Wholesale Grocery Company, a Corporation, Bankrupt, Appellant, vs. Division of Labor Law Enforcement, Department of Industrial Relations, State of California, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed December 5, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13,102

JAMES M. McCLOSKEY, Trustee in Bankruptcy
for Elliott Wholesale Grocery Company, a Corporation,

Appellant,

vs.

DIVISION OF LABOR LAW ENFORCEMENT,
Department of Industrial Relations, State of
California,

Appellee.

APPELLANT'S STATEMENT OF POINTS
TO BE RELIED UPON ON APPEAL

To Division of Labor Law Enforcement, Department of Industrial Relations, State of California, and Pauline Nightingale, Edward M. Belasco and Leon H. Berger, Its Attorneys:

You, and Each of You, will Please Take Notice that under the provisions of Rule 19 (6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, that the Appellant intends to rely upon the following points in its appeal in the above-entitled cause:

1. The District Court erred in its Order of July 26, 1951, in reversing the Order of the Referee in Bankruptcy dated May 17, 1951.

2. The District Court erred in its Order of July 26, 1951, in directing the Referee in Bankruptcy to allow the claims of Alec W. Robinson, Leo P.

Jensen, Ronald A. Grell, Elbert W. Whitney, James F. Bond and Mario Pezzati for severance pay as wage claims entitled to priority under the provisions of Section 64a (2) of the Bankruptcy Act.

3. The District Court erred in its Order of July 26, 1951, in directing the Referee to allow the claims of Alec W. Robinson, Leo P. Jensen, Ronald A. Grell, Elbert W. Whitney, James F. Bond and Mario Pezzati for severance pay as statutory lien claims under the provisions of Section 1204 of the California Code of Civil Procedure and Section 67b of the Bankruptcy Act.

4. The District Court erred in its Order of July 26, 1951, in failing to affirm the Referee in his Order of May 17, 1951, allowing the claims of Alec W. Robinson, Leo P. Jensen, Ronald A. Grell, Elbert W. Whitney, James F. Bond and Mario Pezzati for severance pay as general unsecured claims only.

Dated December 13, 1951.

FRANK C. WELLER,
HUBERT F. LAUGHARN,
THOMAS S. TOBIN,
C. E. H. McDONNELL,

By /s/ C. E. H. McDONNELL,
Attorneys for Appellant James M. McCloskey,
Trustee in Bankruptcy for Elliott Wholesale
Grocery Co.

Affidavit of service by mail attached.

[Endorsed]: Filed December 17, 1951.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF PARTS OF
RECORD BELIEVED NECESSARY FOR
CONSIDERATION ON APPEAL AND TO
BE PRINTED

Pursuant to Rule 19 (6) of this Court, appellatant designates those parts of the record which it thinks necessary for the consideration of the points listed in its statement of points upon which it intends to rely on this appeal from the Order of the District Court filed in the above-entitled proceedings on July 26, 1951, and the portions thereof which it desires to have printed (in each instance omitting the title of court and cause, unless otherwise stated), to wit: the entire record as designated by the Clerk of the District Court to be printed.

Dated December 13, 1951.

FRANK C. WELLER,
HUBERT F. LAUGHARN,
THOMAS S. TOBIN,
C. E. H. McDONNELL,

By /s/ C. E. H. McDONNELL,
Attorneys for Appellant James M. McCloskey,
Trustee in Bankruptcy for Elliott Wholesale
Grocery Co., a Corporation.

Affidavit of service by mail attached.

[Endorsed]: Filed December 17, 1951.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, September 19, 1951.

Before: Healy, Bone and Orr,
Circuit Judges.

[Title of Cause.]

ORDER SUBMITTING PETITION
AND ALLOWING APPEAL

Ordered petition of James M. McCloskey, as Trustee in Bankruptcy for the Estate of Elliott Wholesale Grocery Company for allowance of appeal herein under section 24(b) of the Bankruptcy Act from the order entered on August 10, 1951, in the District Court for the Southern District of California granted, and an appeal from said order be, and hereby is, allowed.



No. 13,102

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES M. McCLOSKEY, Trustee in Bankruptcy for Elliott
Wholesale Grocery Company, a corporation,

Appellant,

vs.

DIVISION OF LABOR LAW ENFORCEMENT, DEPARTMENT
OF INDUSTRIAL RELATIONS, STATE OF CALIFORNIA,

Appellee.

APPELLANT'S OPENING BRIEF.

FRANK C. WELLER,
HUBERT F. LAUGHARN,
THOMAS S. TOBIN,
C. E. H. McDONNELL,

111 West Seventh Street,
Los Angeles 14, California,

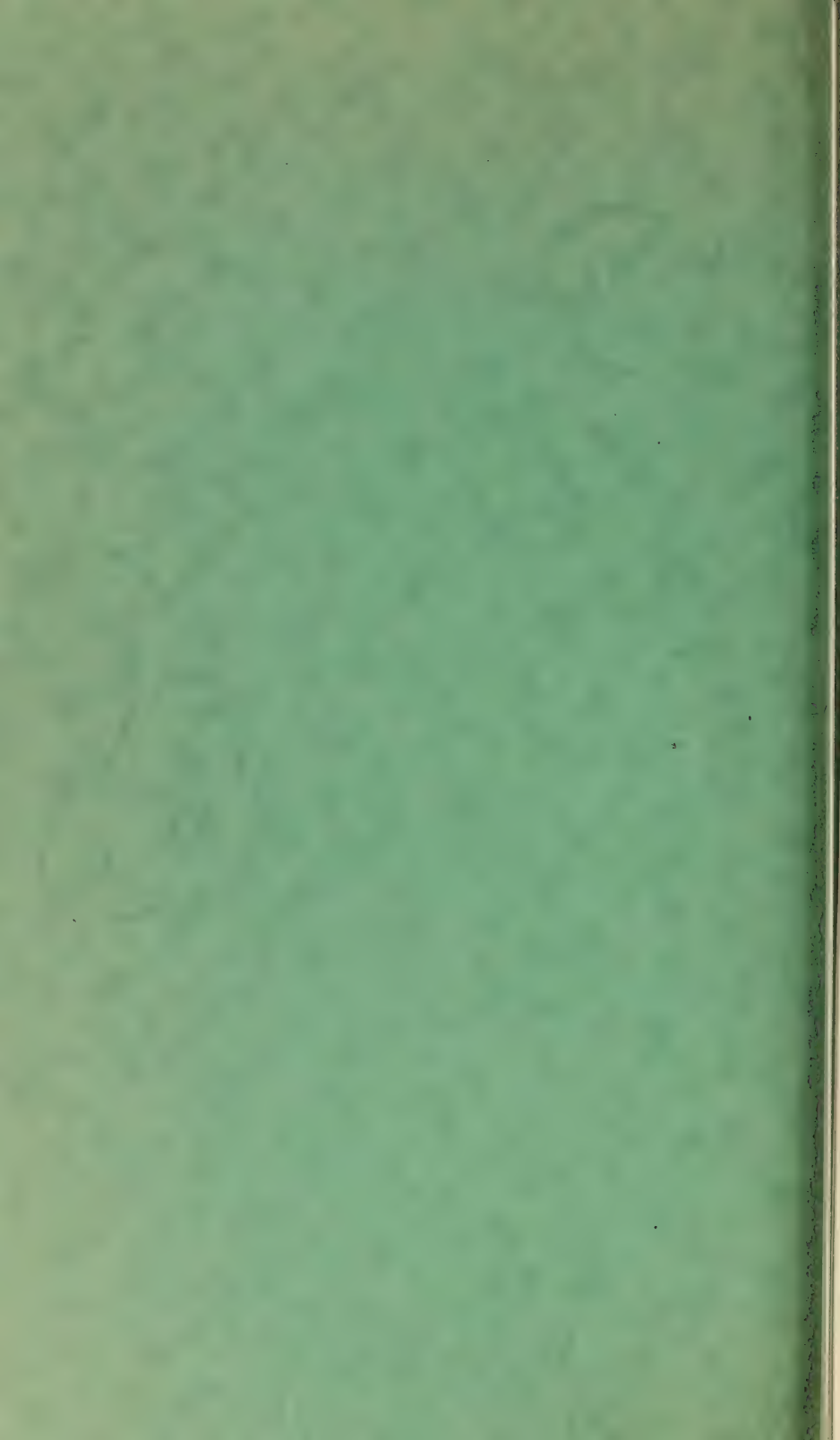
Attorneys for Appellant.

FILED

MAR 10 1952

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

PAUL P. O'BRIEN
CLERK



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No. 13,102

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES M. McCLOSKEY, Trustee in Bankruptcy for Elliott
Wholesale Grocery Company, a corporation,

Appellant,

vs.

DIVISION OF LABOR LAW ENFORCEMENT, DEPARTMENT
OF INDUSTRIAL RELATIONS, STATE OF CALIFORNIA,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Jurisdiction.

The within appeal is taken pursuant to order of this court [Tr. 63] upon appellant's petition under Section 24a of the Bankruptcy Act, 11 U. S. C. Section 47(a) for the allowance of an appeal from an order [Tr. 45-47] of the United States District Court for the Southern District of California, Central Division, entered on July 25, 1951, reversing an order [Tr. 28-32] of the Referee dated May 17, 1951, and directing that claims for severance pay be allowed as claims entitled to priority under Section 64(a)(2) of the Bankruptcy Act.

Statement of the Case.

The Division of Labor Law Enforcement, State of California, filed in the bankruptcy proceedings of the Elliott Wholesale Grocery Company, a Corporation, Bankrupt, a claim [Tr. 11-14] on behalf of certain former employees of the bankrupt in an aggregated amount of \$580.39. To this claim the trustee filed objections [Tr. 18-19], which were set down for hearing on May 4, 1951. On April 24, 1951, an "Amended Proof of Debt in Bankruptcy to Claim Statutory Lien" [Tr. 20-23] was filed by the Division of Labor Law Enforcement in an aggregated amount of \$983.56, of which a total of \$521.50 was for "severance pay" for various employees employed under a union contract.

On May 4, 1951, a hearing was had before the Referee on the trustee's objections [Tr. 18-19] filed to the original claim of the Division of Labor Law Enforcement. By oral stipulation at the time of the hearing the trustee's objections, at that time, were applied against the "Amended Claim" filed April 24, 1951.

At the hearing on May 4, 1951, it developed that the following persons all claimed severance pay in the indicated amounts and that they had been discharged from the bankrupt's employ at the indicated time [Tr. 25 and 26]:

<u>Name</u>	<u>Discharge Date</u>	<u>Severance Pay</u>
Alec W. Robinson	May 26, 1950	\$74.50
Leo P. Jensen	June 1, 1950	\$74.50
Ronald A. Grell	May 26, 1950	\$84.15
Elbert W. Whitney	June 2, 1950	\$84.60
James F. Bond	May 29, 1950	\$74.50
Mario Pezzati	May 19, 1950	\$68.50

The bankrupt, Elliott Wholesale Grocery Company, a California corporation, was engaged, prior to its bankruptcy, in the wholesale grocery business in Santa Barbara, California. At all times during the period of the bankrupt's operation it had a contract [Tr. 26 and 27] with the union to which all the employees here claiming belonged. At all times Article 3, Section 5, of this contract [Tr. 27] read as follows:

“Except for dishonesty, drinking on the job, or gross insubordination, the employer shall give one week's notice or one week's pay in lieu thereof when discharging or laying off an employee. Employees desiring to quit their job shall give the employer one week's notice.”

It is undisputed on this appeal that this union contract and its “severance pay” provision was of full force and effect on the various dates when the employees here claiming were discharged by the employer. It is also conceded upon this appeal that the discharge of these employees was not for dishonesty, drinking on the job, or gross insubordination.

Having fallen on evil days financially, the Elliott Wholesale Grocery Company made a general assignment for benefit of creditors on June 2, 1950. An involuntary petition in bankruptcy [Tr. 3 to 6 incl.] was filed against the Elliott Wholesale Grocery Company on July 21, 1950; adjudication [Tr. 7] followed on August 16, 1950.

Appellant has set forth the hereinabove facts to place this appeal in a proper frame of reference. There has never been, to appellant's knowledge, any dispute as to the facts involved.

Statement of Errors.

1. The District Court erred in its Order of July 26, 1951, in reversing the Order of the Referee in Bankruptcy dated May 17, 1951.

2. The District Court erred in its Order of July 26, 1951, in directing the Referee in Bankruptcy to allow the claims of Alec W. Robinson, Leo P. Jensen, Ronald A. Grell, Elbert W. Whitney, James F. Bond and Mario Pezzati for severance pay as wage claims entitled to priority under the provisions of Section 64a(2) of the Bankruptcy Act.

3. The District Court erred in its Order of July 26, 1951, in directing the Referee to allow the claims of Alec W. Robinson, Leo P. Jensen, Ronald A. Grell, Elbert W. Whitney, James F. Bond and Mario Pezzati for severance pay as statutory lien claims under the provisions of Section 1204 of the California Code of Civil Procedure and Section 67b of the Bankruptcy Act.

4. The District Court erred in its Order of July 26, 1951, in failing to affirm the Referee in his Order of May 17, 1951, allowing the claims of Alec W. Robinson, Leo P. Jensen, Ronald A. Grell, Elbert W. Whitney, James F. Bond and Mario Pezzati for severance pay as general unsecured claims only.

ARGUMENT.

I.

“Severance Pay” Does Not Constitute “Wages” Within the Meaning of Section 64a(2) of the Bankruptcy Act or Section 1204 of the California Code of Civil Procedure.

Let it be clear at once that in the appellant's view the same reasons require rejection of the claim here involved whether we proceed under Section 1204 of the California Code of Civil Procedure or under Section 64a(2) of the Bankruptcy Act. Both of these statutory provisions indicate that the protection they seek to raise for the wage earner must be for wages earned within a stipulated period:

“The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (2) wages, not to exceed Six Hundred Dollars to each claimant, *which have been earned within three months before the date of the commencement of the proceedings*, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; * * *” (Bankruptcy Act, Sec. 64a(2).) (Emphasis supplied.)

“When any assignment whether voluntary or involuntary, and whether formal or informal, is made for the benefit of creditors of the assignor, or results from any proceeding in insolvency or receivership commenced against him, or when any property is turned over to the creditors of a person, firm, association or corporation, or to a receiver or trustee

for benefit of creditors, the *wages* and *salaries* of miners, mechanics, salesmen, servants, clerks, laborers, and other persons *for personal services rendered such assignor, person, firm, association, or corporation, within ninety days prior to such assignment, or taking over of such property, or the commencement of the proceedings when a court action is filed, and not exceeding Two Hundred Dollars (\$200.00) each; constitute preferred claims and liens as between creditors of the debtor, and must be paid by the trustee, assignee or receiver before the claim of any other creditor of the assignor, insolvent, or debtor whose property is so turned over, and must be paid as soon as the money with which to pay such becomes available. * * ** (Cal. Code Civ. Proc., Sec. 1204.) (Emphasis supplied.)

Indeed the California courts themselves recognize this kinship (see *Clark v. Marjorie Michael, Inc.*, 34 Cal. App. 2d 775). This similarity is augmented in the present case by reason of the fact that under the union contract with which we have to deal, if any rights accrued they arose within a period protected by both Section 1204 of the California Code of Civil Procedure and Section 64a(2) of the Bankruptcy Act.

The appellant's position is simple to state: The law raises a priority or a lien (depending upon which statute is employed) only for *wages* for "services rendered" within ninety days of assignment or for "wages earned" within the three months of the filing of the proceedings in bankruptcy. (Cal. Code Civ. Proc., Sec. 1204; Bankruptcy Act, Section 64a(2); *Division of Labor Law Enforcement v. Sampsell*, 172 F. 2d 400; *In re Ko-Ed Tavern*, 129 F. 2d 806, 810; *In re Slomka*, 122 Fed. 630.) In this case appellant asserts that the claim involved is

not for *wages*; and will, as appears hereafter, argue that even assuming the claim is for wages, it is not for wages earned within the period delimited by the statutes involved.

“Wages”, in the normal meaning of that term, are payment for services rendered. Black’s Dictionary of Law defines wages as:

“A compensation given to a hired person for his or her services; the compensation agreed upon by a master to be paid to a servant, or any other person hired to do work or business for him.”

This distinction is well put in the early case of *In re Gurwitz* (C. C. A. 2d), 121 Fed. 982, where, discussing the term as found in an earlier version of the present Section 64a(2) of the Bankruptcy Act, it was said:

“There is nothing ambiguous about the term ‘wages’ in this connection. *The agreed compensation for services rendered* by the workmen, clerks, or servants of the bankrupt * * *.” (Emphasis supplied.)

How can the sums here claimed be brought within the foregoing definitions? When were the “services rendered” which earned this “severance pay”? What was the nature of the “services rendered”? In the appellant’s view the provision for “severance pay” in the union contract is nothing more nor less than another of the surrounding conditions of that labor contract. It is plain that the provision is not integrated with, nor a portion of the compensation to be received by any worker. Article 3, Section 5, of the contract provides [Tr. 27]:

“Except for dishonesty, drinking on the job, or gross insubordination, the employer shall give one

week's notice or one week's pay in lieu thereof when discharging or laying off an employee. Employees desiring to quit their job shall give the employer one week's notice."

It will be noted that under this union contract provision the sums here claimed do not accrue or vary on the basis of the services performed or the period of employment. By the terms of the contract no work is necessary to be done to obtain the benefits of this "severance pay"—the employee need only be employed under the terms of the union contract. In appellant's view this provision does not differ in kind from other surrounding circumstances provided in labor contracts, such as provisions for hiring, union check-off, hours to be worked, and conditions under which labor is to be performed. This sum can then only represent a claim, whose measure is to be the amount of the wages to be paid, true, but it is not to be considered as "wages" such as would bring it within the purview of Section 1204 of the California Code of Civil Procedure or Section 64a(2) of the Bankruptcy Act.

Appellant asserts that careful investigation reveals no case specifically determining the question of whether or not "severance pay" constitutes "wages" within the meaning of the two statutes herein involved. With all due respect to the District Court it is submitted that the authorities cited in its "Memorandum Decision" [Tr. 39 to 45, incl.] in support of the District Court's conclusion that severance pay equals wages are not in point. First of all the case of *Gaspar v. United Milk Products of California* (1944), 62 Cal. App. 2d 540, is cited. This case presents a controversy between the president of Dariglen Creameries, Ltd., and a cooperative who assisted in financing Dariglen's operation. The question presented, primarily,

is whether or not the sale of the assets of Dariglen to the defendant constituted a "discharge" within the meaning of a contract between plaintiff and defendant which provided for the repurchase of certain shares of stock from plaintiff in event of a discharge from Dariglen. The Court held that under the California law such a termination of business constituted a discharge. That such is the law has never been, and is not now, disputed by appellant here. There is no question in this case that the termination of the operations of the Elliott Wholesale Grocery Company by the making of an assignment for the benefit of creditors on June 2, 1950, constituted a discharge of the claimants here involved. Unfortunately the *Gaspar* case does not assist us at all in determining whether or not the claim for severance pay constitutes "wages" within Section 1204 of the California Code of Civil Procedure or within Section 64a(2) of the Bankruptcy Act.

The District Court also cites the cases of *In re Dexter* (1st Cir., 1907), 158 Fed. 788; *In re Collins* (D. C. N. Y., 1937), 18 Fed. Supp. 848; *In re Herbert Candy Company* (D. C. Pa., 1942), 43 Fed. Supp. 588, in support of its conclusion that severance pay equals wages. It is respectfully submitted that these cases are completely beside the point involved. All of them deal with the problem of whether or not commissions to salesmen constitute wages entitled to priority under Section 64a(2) of the Bankruptcy Act. We have not here to do with salesmen, nor with the status of commissions to salesmen. These cases cannot assist us in determining whether or not the "severance pay" provided by the union contract is within the purview of the statutes involved.

In the case of *Cheek v. Division of Labor Law Enforcement, State of California*, 166 F. 2d 429, this Court determined that laborers who had “performed” personal services for the bankrupt within ninety days preceding a general assignment for benefit of creditors preceding the bankruptcy, had a lien upon the bankruptcy estate to the extent of \$200.00 as established by Section 1204 of the California Code of Civil Procedure. In that case, at page 429 of 166 F. 2d, the Court pointed out:

“The two laborers whose rights are in dispute *had performed personal services* for the bankrupt within the period of ninety days preceding the general assignment.” (Emphasis supplied.)

Inasmuch as the amount of the claim here is a subject of contract between the bankrupt and the claimants, it need not necessarily be tied to the rate of compensation. It might be almost any amount. A claim for “severance pay” might be made to apply to the employee who worked but one day before the bankruptcy, and under the union contract, would therefore be entitled to the full liquidated damages of “severance pay.”

Congress established a system of priorities under the Bankruptcy Act. All creditors are vitally interested in the allocations to be made to prior creditors inasmuch as an increase of the amount of priority in one claim automatically reduces the distribution in the lower classes.

To permit the extension of the priority provided by Bankruptcy Act, Section 64a(2), or of the lien rights raised by *California Code of Civil Procedure*, Section 1204, to include claims which are not for services performed will thus take away from those who are next in line, principally the various taxing agencies and general

creditors. Furthermore, it will add to the sum of non-dischargeable debts set out in *Bankruptcy Act*, Section 17a(5). The appellant urges both of these as compelling reasons for not extending beyond the language of the statutes claims asserted to fall therein.

II.

“Severance Pay” Does Not Constitute Wages Earned Within the Statutory Period Protected by Section 64a(2) of the Bankruptcy Act or Section 1204 of the California Code of Civil Procedure.

It will be hereafter assumed, for the purpose of argument only, that, contrary to the view taken by appellant, “severance pay” constitutes “wages” within the meaning of that term as used in Section 64a(2) of the Bankruptcy Act and Section 1204 of the California Code of Civil Procedure.

Under both the California Code of Civil Procedure, Section 1204, and Section 64a(2) of the Bankruptcy Act there is the necessity, in order to secure the priority or lien position, that the labor be performed within a stipulated period.

“The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (2) wages, not to exceed Six Hundred Dollars to each claimant, *which have been earned within three months before the date of the commencement of the proceedings*, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; * * * .” (*Bankruptcy Act*, Sec. 64a(2).) (Emphasis supplied.)

“When any assignment whether voluntary or involuntary, and whether formal or informal, is made for the benefit of creditors of the assignor, or results from any proceeding in insolvency or receivership commenced against him, or when any property is turned over to the creditors of a person, firm, association or corporation, or to a receiver or trustee for benefit of creditors, the *wages and salaries* of miners, mechanics, salesmen, servants, clerks, laborers, and other persons *for personal services rendered such assignor, person, firm, association, or corporation, within ninety days prior to such assignment, or taking over of such property, or the commencement of the proceedings when a court action is filed, and not exceeding Two Hundred Dollars (\$200.00) each, constitute preferred claims and liens as between creditors of the debtor, and must be paid by the trustee, assignee or receiver before the claim of any other creditor of the assignor, insolvent, or debtor whose property is so turned over, and must be paid as soon as the money with which to pay such becomes available. * * **” (*Code Civ. Proc.*, Sec. 1204.) (Emphasis supplied.)

This poses the immediate question: When was the “severance pay” earned? It is incumbent upon a claimant to establish that the wages were earned within the three months next preceding the filing of the petition in bankruptcy, or within ninety days of a general assignment, if he is to seek the protection of Section 64a (2) of the Bankruptcy Act or Section 1204 of the California Code of Civil Procedure. The trustee submits that if “severance pay” was “earned” at all, it was earned at the instant of hiring, since, it was at that time that the right accrued. Immediately upon the hiring of an employee covered by this union contract he was brought within the

protection of this “severance pay” provision. Nothing the employee could do would augment or diminish one iota the amount of notice, or pay in lieu thereof, provided for him by the union contract. If he were discharged for other causes than those set forth he must be employed for a period of an additional week or given a week’s pay in lieu thereof.

In this connection the case of *Division of Labor Law Enforcement v. Sampsell* (C. C. A. 9th), 172 F. 2d 400, is of assistance. This is one of the leading cases in the United States determining that vacation pay is wages and should have a prorated priority. In that case it was contended by the Division of Labor Law Enforcement that all of the vacation pay should be entitled to priority since the period of service required to earn vacation pay was completed within the statutory period protected by Section 64a (2) of the Bankruptcy Act. The court rejected this contention, carefully preserving the separation between that portion of the vacation pay earned during the priority period and that earned outside thereof, saying at pages 401-402 of 172 F. 2d:

“Under the terms of the statute the compensation claimed must have been earned within the three months’ period and also must be due. If any employee here had not, prior to bankruptcy, completed a year’s continuous service no compensation for vacation time would have been due him, regard being had to the wage agreement. All having completed the required year’s service prior to bankruptcy, vacation compensation may fairly be regarded as due even though the vacation was not to be taken until some later time; but the vacation had been earned by the performance of the entire year’s service, and only one-fourth of it earned during the three months preceding bankruptcy.” (Emphasis supplied.)

This case is indicative of the care which this circuit has always used to preserve inviolate the requirement set up in Section 64a (2) of the Bankruptcy Act that to be accorded priority wages, whatever form they might take, must have been earned within the three months immediately preceding the commencement of the bankruptcy proceedings.

The District Court has here held that "severance pay" is wages for the week of the notice that should be given under the union contract; that this period of notice which should be given falls within the priority period protected by Section 64a (2) of the Bankruptcy Act and therefore is entitled to prior payment thereunder. The Court says [Tr. 44]:

"* * * in the case before us the minimum notice is one week. When the employer does not give the notice, either through voluntary choice or by force of circumstances, he is required to pay a week's wages. The wages are compensation *for the week*. The right to it is guaranteed in the contract. But the right to receive it is postponed to the time when the notice was due and was not given.

"So the severance pay is not earned, as the trustee argues, at the time the contract of employment is entered into, but at the time the week's notice is due. In effect, through the contract, the employer says to the employee, 'If I discharge you without cause I shall give you a week's notice. If I choose not to give you the notice, or circumstances, such as my going out of business, prevent me from giving it to you, I shall pay you the week's wages.'

"So the payments claimed here are for wages earned for the week. And the Referee was wrong in denying them preferred status."

With all respect to the Disrtict Court, appellant submits that this is incorrect. The priority accorded by Section 64a (2) of the Bankruptcy Act is for *wages earned*. When was the claimed severance pay earned? It cannot be said to have been earned after the business closed, because obviously no services could be rendered, no work performed. If "earned" at all it must have been earned prior to that time. Yet by the terms of the union contract, since the severance pay was not connected directly to compensation, the claimants were compensated for the work performed prior to the date when the assignment was made and the business closed down. Appellant asserts that if "earned" at all, this severance pay must have been "earned" at the moment of employment, because it was then that the right arose, without regard to the way in which its payment might be postponed. As the District Court itself says [Tr. 44]

"the right to it is guaranteed in the contract. But the right to receive it is postponed to the time when the notice was due and was not given."

Consider, for a moment, a hypothetical case with a union contract identical to the one herein involved. Let us assume that bankruptcy is filed the final day of the operation of the business and employees are discharged on that day without notice, and without the payment of any severance pay as provided in the assumed union contract. If the reasoning of the District Court is sound then a right would arise in each employee protected by the union contract to one week's salary for the week succeeding the filing of the involuntary petition and his layoff. Since this would follow the commencement of the bankruptcy proceedings by the filing of the petition it could not fall within the protection of Section 64a (2) of the Bankruptcy Act which

provides a priority for work performed prior to the commencement of the bankruptcy proceedings, but must be under the protection of Section 64a (1) of the Bankruptcy Act. And yet the employment in this period after the commencement of the bankruptcy proceedings would be without the authorization of the Court, without the adoption of any union contract by the trustee, and based upon the necessary action of the employer in terminating his business at the date bankruptcy was filed. The estate would be obliged to pay, then, under the reasoning of the District Court, for services which conferred no benefit whatsoever upon the estate. Such is the inevitable result reached by the application of the reasoning of the District Court in this case.

Nor should this hypothetical example be considered far-fetched. If the reasoning of the District Court is accepted, such results will inevitably occur. In many bankruptcy proceedings termination of business operations coincides with the filing of the petition commencing the proceedings. Whenever this happens the situation presented in the hypothetical case just propounded will arise.

What has been said immediately heretofore as to the difficulties confronting the claims of the appellant under Section 64a(2) of the Bankruptcy Act, likewise applies to an assertion of rights under Section 1204 of the California Code of Civil Procedure, which extends the protection of lien rights to “* * * wages and salaries * * * for personal services rendered * * * within ninety days prior to such assignment * * *.”

Conclusion.

To be brought within the protection of Section 64a(2) of the Bankruptcy Act or Section 1204 of the California Code of Civil Procedure a claim must satisfy certain conditions. Basically, *it must be for wages, and for wages earned within three months of bankruptcy or ninety days of assignment*, depending on which statute is the basis of the right asserted. The appellant urges that it cannot be said here that under this contract the "severance pay" claimed is in any way involved with the services of the claimant so as to fall within the term "wages" no matter how broadly it may be defined. Furthermore, even if these claims be crowded within the term "wages," there is no showing that they were *earned* within the period delimited by the statutes involved.

For these reasons, it is respectfully submitted that the Findings and Order of the Referee denying priority to the claim of the appellant should be upheld, and the Findings and Order of the District Court reversed.

Respectfully submitted,

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No. 13102

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES M. McCLOSKEY, Trustee in
Bankruptcy for Elliott Wholesale Gro-
cery Company, a corporation,

Appellant,

v.

DIVISION OF LABOR LAW ENFORCE-
MENT, DEPARTMENT OF INDUS-
TRIAL RELATIONS, STATE OF
CALIFORNIA,

Appellee.

APPELLEE'S BRIEF

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DIVISION OF LABOR LAW ENFORCE-
MENT, DEPARTMENT OF INDUS-
TRIAL RELATIONS, STATE OF
CALIFORNIA,

Appellee.

APPELLEE'S BRIEF

STATEMENT OF JURISDICTION

This appeal has been allowed by this court and is from an order of the United States District Court for the Southern District of California, Central Division, entered on July 25, 1951, which directs that appellee's claims for severance pay be allowed as claims entitled to priority under Section 64a (2) of the Bankruptcy Act, and that such claims also be allowed as statutory lien claims entitled to priority under Section 67b of the Bankruptcy Act. (Tr., p. 47.)

OPINION BELOW

The opinion of the district judge is found at pp. 40-45 of the Transcript of Record.

STATUTES INVOLVED

Bankruptcy Act, Section 64a (2): (U. S. Code, Title 11, Ch. 7, Sec. 104)

“a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (2) wages, not to exceed \$600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; * * *.”

Bankruptcy Act, Section 67b (U. S. Code, Title 11, Ch. 7, Sec. 107)

“The provisions of section 60 of this Act to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons, and statutory liens for taxes and debts owing to the United States or any State or subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition in bankruptcy or of the original petition under chapter X, XI, XII, or XIII of this Act, by or against him. * * *”

California Code of Civil Procedure, Section 1204

“When any assignment, whether voluntary or involuntary, and whether formal or informal, is made for the benefit of creditors of the assignor, or results from any proceeding in insolvency or receivership commenced against him, or when any property is turned over to the creditors of a person, firm, association or corporation, or to a receiver or trustee for the benefit of creditors, the wages and salaries of minors, mechanics, salesmen, servants, clerks, laborers, and other persons, for personal services rendered such assignor, person, firm, association or corporation, within 90 days prior to such assignment, or the taking over of such property, or to the commencement of the proceeding when a court action is involved, and not exceeding two hundred dollars (\$200) each, constitute preferred claims and liens as between creditors of the debtor, and must be paid by the trustee, assignee or receiver before the claim of any other creditor of the assignor, insolvent, or debtor whose property is so turned over, and must be paid as soon as the money with which to pay same becomes available. * * *”

QUESTIONS PRESENTED

1. Is severance or dismissal pay, in lieu of notice, wages entitled to priority under Section 64a (2) of the Bankruptcy Act?
2. Is severance or dismissal pay, in lieu of notice, wages entitled to lien status under Section 1204 of the California Code of Civil Procedure and thus entitled to priority under Section 67b of the Bankruptcy Act?

SUMMARY OF ARGUMENT

Severance or dismissal pay becoming due under a collective bargaining contract upon failure of an employer to give notice of discharge is wages within the meaning of Section 64a (2) of the Bankruptcy Act and Section 1204 of the California Code of Civil Procedure. Like vacation pay, holiday pay and other forms of additional remuneration, it is part of the wage compensation agreed upon.

Severance pay may be of two types: (1) that which accrues over a specified period of time in similar fashion to most vacation pay provisions and (2) severance pay in lieu of notice which is earned and accrues at the moment of discharge without reference to prior service, and is for the week for which the notice was not given. A provision for severance pay is not an agreement to pay liquidated damages. The right to it is wages within the terms of the hiring and not damages for breach of contract.

ARGUMENT

- I. "Severance" or "Dismissal" Pay, Given in Lieu of Notice, Is Wages Under Section 64a (2) of the Bankruptcy Act and Wages for Personal Services Under Section 1204 of the California Code of Civil Procedure

It is now well settled that "severance" or "dismissal" pay constitutes wages within the meaning of the Bankruptcy Act.

In re Public Ledger, 161 F. (2d) 762;

In re Men's Clothing Authority, 71 F. Supp. 469.

The *Public Ledger* case, supra, is widely recognized as the leading authority upon the subject of severance pay and its reasoning is properly determinative of this case. In the *Public Ledger* case Judge Albert Lee Stephens considered the legal effect of two collective bargaining contracts, each of which contained provisions for severance pay. The Typographical Union contract provided for a two-day notice prior to layoff. The court stated, with respect to the contract provisions regarding severance pay (page 770) :

“They are a part of the wage compensation agreed upon and are entirely reasonable as protection to the workman against having his needed income stop without even a day to meet emergencies.

* * *

“The claims under the layoff provision of the contract are for wages. The provision protects against a sudden, unexpected and unprepared for stoppage of wages. It provides that knowledge of a break in the continuity of work and the consequent lack of pay shall be given the employee and it is the employer’s duty to give it. If he does not give it, the wage continues unaffected for the term of the required notice. Whether the layoff occurs through bankruptcy or any other cause does not affect the validity of this wage requirement. For the lack of a better term, we call this contractual arrangement one for severance pay.”

Severance pay has also been held to constitute wages in state liquidation and dissolution proceedings.

In re Brooklyn Citizen, 90 N. Y. S. (2d) 99;
Montefalcone v. Banco Di Napoli, 268 App. Div.
636; 52 N. Y. S. (2d) 655;

In accordance with the general rule, severance pay has likewise been held to be “wages” under maritime law entitling seamen to a lien for wages earned.

Gayner v. The New Orleans, 54 F. Supp. 25.

For purpose of federal tax laws, severance payments made to employees are generally regarded as wages.

Poorman v. Commissioner, 131 Fed. (2d) 946.

See also:

1 Mertens, *Law of Federal Income Taxation*, 1942, Section 8.08.

The classification of severance pay as wages is in accord with the general rule that other supplemental or additional compensation constitutes wages. This has long been the rule in the federal courts with respect to vacation pay. Thus, *In re Wil-low Cafeterias, Inc.*, 111 F. (2d) 429, 432, states:

“A vacation with pay is in effect additional wages. * * *”

This is the rule regarding vacation pay that has been adopted by this court.

Division of Labor Law Enforcement v. Sampsell, 172 F. (2d) 400.

As stated by the district judge in his opinion in the case at bar (Tr., p. 42):

“Provisions of this character, whether they call for wages on discharge without notice, or for payment for earned vacation periods, are generally

considered wages—that is, compensation for services rendered, which, through no fault of the employee, he was not permitted to render. * * *”

II. The Severance Pay in the Case at Bar Was Earned at the Time of Discharge

Severance pay may be defined as the payment of a specific sum, in addition to any back wages or salary, made by an employer to an employee for permanently terminating the employment relationship primarily for reasons beyond the control of the employee.

Gayner v. The New Orleans, supra;

Hawkins, *Dismissal Compensation*, pp. 5-6, Princeton University Press, 1940;

U. S. Dept. of Labor, *Monthly Labor Review*, Vol. 70, No. 4, April, 1950, p. 384.

Severance or dismissal pay was a novelty, if not completely unknown, in the early days of commerce and industry in this country. It is thus not to be found referred to in early definitions of the term “wages” or in the early case law. Today, however, it is frequently contained in collective bargaining agreements as part of the compensation provided for by such contract.

Hawkins, *Dismissal Compensation*, supra, pp. 19, 29-33.

Severance pay, like vacation pay, premium pay, and other elements of a worker’s earnings, is wages under the contract of hire; it is earned and becomes payable under whatever conditions are specified by the employer in his promise.

Such dismissal or severance wages can be said to fall into two broad categories: On the one hand, are those types that accrue day by day or month by month, as the employee's length of service increases, and to which he becomes entitled upon termination or dismissal, either on a pro rata basis or after the completion of a specified period of employment.

On the other hand, severance pay may fall into a *second and different* category, and this is *severance pay in lieu of notice*. Such is the severance pay in the case at bar.

In the first class of severance pay mentioned above, eligibility for payment relates to employment for a given period. This severance pay can be likened to most vacation pay agreements, which likewise almost uniformly are based upon length of service.

Division of Labor Law Enforcement v. Sampsell,
172 F. (2d) 400;

In re Wil-low Cafeterias, Inc. (supra).

Such severance pay has been described as "an equity which the individual employee builds up in his job and for which he should be compensated when discharged for cause or economic reasons, or when he resigns, retires or dies. The longer an employee works for one employer, the greater his equity in the job."

U. S. Dept. of Labor, Bureau of Labor Statistics,
Bulletin No. 908-5, p. 35 (1948), *Collective Bargaining Provisions and Dismissal Pay Provisions*.

In *Division of Labor Law Enforcement v. Sampsell*, supra, this court held that where vacation pay was conditioned upon prior employment for a year, such vacation earnings would be deemed spread over the entire period; that although it became due during the priority period, since the contract provided a *further* condition of prior employment, such previous service must necessarily also be considered as the earning period, and such employee earned his vacation day by day during the year, in accordance with the condition of the promise. The court thereupon concluded that only one-quarter of the vacation was earned in the three months prior to completing the year of service. Like the vacation pay in the *Sampsell* case, severance or dismissal pay *conditioned on prior employment* would be held to be earned and accrued as the employment progressed. Thus, applying the rule of the *Sampsell* case, only the portion of severance pay accruing during the three months immediately prior to assignment or bankruptcy would be entitled to lien status or priority as wages under Section 64a (2) of the Bankruptcy Act.

Appellant's dissatisfaction with the decision of the district judge in the case at bar appears based upon the misconception that severance pay can only be earned gradually as work progresses. But the severance pay here is of the *second* type mentioned above.

Such severance or dismissal pay in lieu of notice could be equally described as "notice pay." However

designated, it is unrelated to any period of prior service or length of service. It is wholly related to the lack of notice. It is for this reason, as the district judge made clear, that the pay is *wages for the period of the prescribed notice which was not given*; thus, *no specific period of service* is required. Hence, the week's wages are not allocable to a year or six months or three months of employment. They are instead allocable only to the week in which they were earned and in which they accrued, which is the week for which the notice was not given.

The same situation was present in the *Public Ledger* case. There the Typographical Union contract provided for severance pay in the absence of the required notice, regardless of the length of service by the employee. The statement at page 771 of the court's opinion delineates the law with respect to the specific problem found in the case at bar:

“The severance pay, in that it moves to all employees, *regardless of length of service*, is held to be wages wholly earned and accrued under the trustee's management and, therefore, is entitled to priority as such.” (Emphasis added.)

In the case at bar, the severance pay likewise does not depend upon the length of service, and likewise is payable only if the required notice is not given.

The contract provides, in Article 3, Section 5 (Tr. p. 27):

“Except for dishonesty, drinking on the job, or gross insubordination, the employer shall give one week's notice or *one week's pay in lieu thereof*

when discharging or laying off an employee. Employees desiring to quit their job shall give the employer one week's notice." (Emphasis added.)

By the very terms of the contract, the payment to be given in lieu of the notice is one week's pay. This week's pay becomes earned upon the failure of the employer to give the week's notice.

As stated by the district court (Tr., p. 44):

"* * * When the employer does not give the notice, either through voluntary choice or by force of circumstances, he is required to pay a week's wages. The wages are compensation for the week.
* * *"

Whether this week be deemed the week immediately prior to or immediately after the discharge, the wages are earned within the priority period and relate directly to the services of the employee under the terms of his employment contract.

Appellant argues that no wages could be "earned" unless earned for specific work, and that no "work" was performed for the severance pay. (Appellant's Brief, p. 15). Appellant appears to claim that in order to *earn* wages the employee must be performing services every minute, hour or day. Such a view is not in accordance with accepted present-day concepts of the nature of earnings from employment. A person may earn wages equally when he is performing no services for his employer as when he is working at the machine or the desk. He may earn wages although the employer provides no work for him to do. Also, he may

be earning wages even though at the same time he is engaged on other business personal to himself. The true test is whether or not the sum to be paid is related to and is a part of the agreed remuneration to which he is entitled under the terms of the employment contract.

Nierotko v. Social Security Board, 149 F. (2d) 273, 275; affirmed, 327 U. S. 358; 66 S. Ct. 637; 162 A. L. R. 1445;

Day-Brite Lighting v. Missouri, 96 L. Ed. (Adv. Ops.), 343, 345. (U. S. Sup. Ct., Mar. 3, 1952);

In re B. H. Gladding Co., 120 F. 709, 711.

Modern conditions of employment under collective bargaining contracts provide for the earning of wages calculated upon a variety of bases, in addition to regular pay for services rendered. Some of these are directly related to the actual rendition of particular services, such as overtime pay and premium pay; others relate to past services, such as when vacation pay and severance pay are based upon length of services; and still others relate to time to be paid for, though not worked, such as holiday pay or services that would have been performed if the employer had maintained the employment relationship in a particular manner, such as minimum wages, stand-by time, reporting time, and severance pay in lieu of notice. In each of these cases wages are earned, though no specific services are performed for such wages. Thus, severance pay in lieu of notice is the wages earned for the period the worker would have worked if the

prescribed notice had been given—*it is wages for the period of the notice.*

Cliffords Olympia Co. v. Waters, 84 Ill. App. 664;
National Overall Dry Cleaning Co. v. Yauner,
321 Mass. 434, 73 NE. (2d) 744.

In the *Yauner* case the court states (p. 439):

“The lack of a formal notice in and of itself would not be of controlling significance, because the discharge on September 3, 1946, was the equivalent of such a notice and the absence of such notice would not deprive the defendant of his wages for the subsequent week and, if not paid when due, he could recover those wages in an action at law, but that would be the full measure of recovery.”

The error of considering severance pay as constituting a claim for liquidated damages, as was done by the referee in the case at bar (Tr. p. 28), is also disposed of in the *Public Ledger* case. There the contention was made that a provision for severance pay upon dismissal was in effect a provision for damages for breach. After citing *Gaspar v. United Milk Producers of California*, 62 Cal. App. (2d) 546, which held that a cessation of employment by reason of the sale of the business constituted a discharge, the court distinguished various New York cases and declared (pp. 772-3):

“They do not involve severance pay contractual provisions but rather damages for alleged breaches of contracts of employment. The claims in those cases were based on the theory that a collective

bargaining agreement amounted to a promise by the employer to furnish each member of the contracting union employment for the term of the contract. The cases hold that such a theory is incorrect. In the instant case the claims are not for damages for breaching the contract to keep the Guild members employed for the contractual period beyond January 5, 1942, but rather for severance pay, which accrued under the contract when they lost their jobs through the business management's act of shutting the business down."

This court has declared in *Blessing v. Blanchard*, 223 F. 35, 37, that priority of payment of wages provided for under the Bankruptcy Act is intended for the benefit of "those who are dependent upon their wages, and who, having lost their employment by the bankruptcy, would be in need of such protection."

It is appellee's position that the provision for dismissal or severance pay, agreed to be given in lieu of notice, is to accomplish and implement the very objective of the priority provisions of the Bankruptcy Act which insure preference for the final earnings of employees who help create the assets of the bankrupt, but are not apt to be aware of impending insolvency, bankruptcy or assignment. Appellee submits that where an employer has sought to insure to his employees a week's wages after the worker learns he is to lose his job, this court should not declare that such purpose is to be frustrated; an employer's insolvency or bankruptcy should not cause the worker's protection against sudden discharge to be relegated to the

status of a commercial creditor. Appellee further submits that this court should give effect to the specific purpose of severance pay in lieu of notice: that it be held earned at the time of discharge for the week of the notice, and therefore entitled to preferred status under Sections 64a (2) and 67b of the Bankruptcy Act.

CONCLUSION

The order and judgment of the district court should be affirmed.

Respectfully submitted,

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No. 13103

United States
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Transcript of Record

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Southern District of California, Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

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United States Attorney,

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Los Angeles 12, Calif.

For Appellees:

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OLIVER O. CLARK,

DAVID D. SALLEE,
712 Rowan Bldg.
458 S. Spring St.
Los Angeles 13, Calif. [1]*

* Page numbering appearing at bottom of page of original certified Transcript of Record.

In the District Court of the United States, Southern
District of California, Central Division

No. 1321 O'C—Civil

LEE ARENAS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

PETITION FOR SUPPLEMENTAL DECREE
FOR ATTORNEYS' FEES AND EXPENSES
ADVANCED, FOR SALE OF PROPERTY
AND FOR APPOINTMENT OF RECEIVER.

The petition of John W. Preston, Oliver O. Clark
and David D. Sallee, respectfully alleges:

I.

That the above entitled action was begun in this Court on the 24th day of December, 1940, and this Court rendered judgment therein on the 14th day of May, 1945, adjudging that plaintiff was entitled to trust patents to the lands allotted in 1923 and re-allotted in 1927 to Lee Arenas, Guadaloupe Arenas, Francisco Arenas and Simon Arenas. That the United States of America appealed from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and said Court on the 12th day of December, 1946, affirmed that portion of said judgment adjudging that plaintiff was entitled to trust patents to the lands allotted to Lee Arenas and Guadaloupe Arenas, but decreed that plaintiff was

not entitled to [2] trust patents to the lands allotted to Francisco Arenas and Simon Arenas. That thereafter plaintiff filed a petition for a writ of certiorari to said Circuit Court of Appeals in the Supreme Court of the United States, which was denied by said Court on the 9th day of June, 1947. That the judgment of this Court, as modified by the Circuit Court of Appeals, is final.

II.

That petitioners acted as attorneys for plaintiff at his request throughout the litigation. That originally their employment was evidenced by a written contract approved by this Court and dated November 20, 1940. That said contract was later, to wit, on the 1st day of February, 1945, superseded by a new contract with petitioners, which provided as follows:

“I hereby agree to pay my said attorneys upon a quantum meruit basis for services rendered and to advance or reimburse any and all expenses incurred in my behalf or in behalf of any and all members of my family.”

III.

That the plaintiff, Lee Arenas, was at all times mentioned herein, and is now, a duly enrolled and recognized member of the Agua Caliente or Palm Springs Band of Mission Indians and has at all such times resided upon the Reservation of said Band of Indians in the County of Riverside, State of California.

IV.

That by the final judgment in this action, as modified by the United States Circuit Court of Appeals for the Ninth Circuit, it was decreed that plaintiff was, and is, entitled to trust patents to the lands allotted in 1927 to Lee Arenas and to Guadalupe Arenas, his wife, which lands are more particularly described as follows, to wit: [3]

Lands Allotted to Lee Arenas:

Parcel (a) Homesite: Lot 46, Section 14, Township 4 South, Range 4 East, S.B.B.&M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 39, Section 26, Township 4 South, Range 4 East, S.B.B.&M., comprising five (5) acres;

Parcel (C) Desert: $E\frac{1}{2}$ $SW\frac{1}{4}$ $NW\frac{1}{4}$ and $SE\frac{1}{4}$ $NW\frac{1}{4}$ $NW\frac{1}{4}$ and $SW\frac{1}{4}$ $NE\frac{1}{4}$ $NW\frac{1}{4}$ all in Section 26, Township 4 South, Range 4 East, S.B.B.&M., comprising forty (40) acres.

Lands Allotted to Guadalupe Arenas:

Parcel (a) Homesite: Lot 47, Section 14, Township 4 South, Range 4 East, S.B.B.&M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 40, Section 26, Township 4 South, Range 4 East, S.B.B.&M., comprising five (5) acres;

Parcel (C) Desert: $SE\frac{1}{4}$ $NW\frac{1}{4}$ all in Section 26, Township 4 South, Range 4 East, S.B.B.&M., comprising forty (40) acres.

V.

That the application for allotment, and the selections of lands for allotment, made by Lee Arenas

and Guadalupe Arenas, and the proceedings had thereon in 1927, including the certification and submission of the allotment schedule to the Secretary of the Interior by H. E. Wadsworth, the United States Special Allotting Agent at Large for the Mission Indian Reservations in California, and the certificates issued by said Special Allotting Agent to Lee Arenas and Guadalupe Arenas, were declared and adjudged by this Court to be in all respects legal and binding against the United States in the judgment rendered by this Court on the 14th day of May, 1945, and by the United States Circuit Court of Appeals for the Ninth Circuit, except as modified by the decree of said [4] Circuit Court of Appeals.

VI.

That by the decree of the United States Circuit Court of Appeals for the Ninth Circuit in this action, the date upon which the period of restriction on alienation shall begin to run, as prescribed by Section 5 of the Act of January 12, 1891 (26 Stat. L. 712), is the 9th day of May, 1927.

VII.

That all of the lands described in Paragraph IV hereof lie within or near the City of Palm Springs, County of Riverside, State of California, and taken together the said lands have a present day value in excess of One Million Dollars (\$1,000,000.00). That portions of said lands, at the present time, are producing rentals of the value of about Seven Thousand Five Hundred Dollars (\$7,500.00) per annum; but

if said lands are properly managed and handled, they should produce in rentals a much larger sum per annum, to wit, a sum in excess of Twenty Thousand Dollars (\$20,000.00).

VIII.

That petitioners have not been paid, nor have they received, any sum whatsoever for their services in this action which have extended over a period of more than six years. That petitioners have advanced for necessary expenses in prosecuting this action the sum of Two Hundred Fifty-eight Dollars and Sixty-seven Cents (\$258.67), no part of which sum has been paid or refunded to them.

IX.

That the following is a brief description and recital of the work done and performed by the petitioners in this case, to wit:

The complaint was prepared by petitioners and filed in this action on the 24th day of December, 1940. Thereafter three amended [5] complaints were prepared and filed by petitioners. The pleadings presented extraordinary difficulties, arising out of unique and unusual legal questions and factual situations.

Two trials of the action were had in this Court; two appeals were conducted from the judgments of this Court to the Circuit Court of Appeals for the Ninth Circuit, both appeals being elaborately briefed by petitioners; two petitions for rehearing were prepared and filed by petitioners; two petitions for

writs of certiorari to the Circuit Court of Appeals were prepared and filed in the Supreme Court of the United States, with supporting briefs and records, the first of which petitions was granted and the cause was thereupon rebriefed, heard and argued orally in the Supreme Court of the United States, resulting in a reversal of the first judgment herein; and the second petition for certiorari was denied by the Supreme Court on the 9th day of June, 1947.

That a more particular and chronological statement of the steps taken, and of the work done by petitioners, in this cause is as follows:

The original complaint was filed on December 24, 1940;

First Amended Complaint was filed;

Second Amended Complaint, 48 pages, filed October 27, 1941;

Motion of defendant, United States of America, to dismiss and motion for summary judgment filed November 29, 1941; the latter motion was heard on January 12, 1942 and was postponed until January 26, 1942, and was granted on March 6, 1942;

Plaintiff's Notice of Appeal from said judgment to the Circuit Court of Appeals for the Ninth Circuit was filed June 4, 1942;

The Record on Appeal was filed August 21, 1942;

Plaintiff's Opening Brief, 45 pages, and appendix thereto, 6 pages, filed November 16, 1942; [6]

Brief for United States of America filed December 11, 1942;

Plaintiff's Reply Brief, 7 pages, filed January 26, 1943;

Judgment of District Court affirmed June 30, 1943;

Petition for Rehearing filed July 23, 1943; Rehearing denied August 4, 1943;

Petition for Writ of Certiorari and supporting brief, 23 pages, with supporting record, 78 pages, filed in Supreme Court of the United States October 29, 1943;

Writ of Certiorari granted by Supreme Court December 20, 1943;

Supplemental Brief of plaintiff, 25 pages, filed February 25, 1944; cause argued by two of plaintiff's counsel in Supreme Court on March 6 and 7, 1944;

Order of Supreme Court reversing judgment below entered May 22, 1944;

Thereafter, on January 9, 1945, petitioners filed a third amended complaint for plaintiff to conform to the opinion of the Supreme Court of the United States;

The cause was prepared for trial, and the trial was had upon the issues raised by the third amended complaint and the answer thereto on January 30 and 31, 1945;

The evidence and exhibits introduced comprised approximately 600 printed pages, the exhibits alone being more than 200 pages;

Judgment for plaintiff was rendered by this Court on May 14, 1945, based upon elaborate find-

ings of fact and conclusions of law, prepared by petitioners, consisting of 29 pages;

The United States of America made many objections to the findings, and also made motions to set them aside, requiring attendance and argument thereof by petitioners in open Court;

The United States of America appealed from the judgment to the Circuit Court of Appeals for the Ninth Circuit on August 8, 1945;

Both parties filed elaborate briefs in said Court, [7] plaintiff's brief containing 39 pages; and thereafter petitioners argued the case orally in said Court;

On December 12, 1946, the Circuit Court of Appeals made and entered its decree, affirming said judgment in part and reversing it in part, the effect of which decision was to give plaintiff the lands allotted in 1927 to him and to his wife, Guadalupe Arenas, consisting of 94 acres more or less, and denying plaintiff the lands allotted to Francisco Arenas and Simon Arenas, father and brother, respectively, of plaintiff;

Petitioners thereupon prepared and filed in said Court on January 13, 1947, a petition for a rehearing, consisting of 15 pages, and said petition was denied on January 14, 1947. Petitioners thereafter prepared a record of the case for filing in the Supreme Court of the United States, consisting of 676 printed pages, in support of a petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, which petition and supporting brief and appendix thereto, consisting of 32 pages was,

within the time allowed by law, filed in the Supreme Court of the United States, and by that Court was denied on June 9, 1947.

X.

That petitioners have not kept an accurate record of the time spent in the work done by them in the course of this litigation, but they estimate that the number of Court appearances exceeded fifty (50) and that the number of man days spent in office work on the case was from two hundred and fifty (250) to three hundred (300).

XI.

That the property awarded to plaintiff by the judgment in this action consists of four (4) acres in Section 14, Twp. 4 S., R. 4 E of San Ber. M., in the heart of the City of Palm Springs, and ninety (90) acres in Section 26, Twp. 4 S., R. 4 E of San Ber. M., situated near the business area of said city. That said ninety [8] (90) acres is now being used as a motor court on which there are some forty (40) structures used in connection therewith. That plaintiff, Lee Arenas, is more than seventy (70) years of age, is in feeble health, and is physically unable to care for said property. That if said property were in the hands of a competent manager, the annual income therefrom would probably exceed Twenty Thousand Dollars (\$20,000.00), but under the present management thereof the annual income from said property is about Seven Thousand Five Hundred Dollars (\$7,500.00).

That the compensation of petitioners for services rendered in this case must be paid either from the

proceeds of a sale of said property, or from a portion of the income derived therefrom in which latter event it would probably require a substantial part of such income for a period of many years to pay the compensation due to petitioners.

XII.

Petitioners allege that an amount equal to thirty-three and one-third percent ($33\frac{1}{3}\%$) of the actual present day value of plaintiff's property, described in Paragraph IV hereof, would be a reasonable fee to them for the services rendered to plaintiff in securing the allotments awarded plaintiff by the judgment of this Court, as modified by the decree of the Circuit Court of Appeals.

XIII.

That petitioners are entitled to have a lien impressed upon plaintiff's property to secure the amount due them pending the full payment thereof.

XIV.

That by reason of the facts alleged in this petition a receiver should be appointed by the Court to take charge of plaintiff's said property and to manage and operate the same under the orders of the Court, so that the greatest amount of income possible may be derived therefrom, to the end that both plaintiff [9] and petitioners may receive such portions of the income as the Court may deem just and proper, the amounts paid to petitioners to be credited upon the judgment awarded by the Court to petitioners.

Wherefore, the petitioners pray:

1. That an order to show cause, directed to the

United States of America and to the plaintiff, Lee Arenas, issue fixing the time and place for the hearing of this petition;

2. That petitioners have judgment against the plaintiff, Lee Arenas, for an amount equal to thirty-three and one-third per cent ($33\frac{1}{3}\%$) of the present day value of the property described in Paragraph IV of this petition, as fees for the services rendered by them to plaintiff in this action, and for the further sum of Two Hundred Fifty-Eight and $67/100$ Dollars (\$258.67) advanced by petitioners as and for necessary expenses in prosecuting this action;

3. That it be adjudged that petitioners have a lien, and that said lien be fixed and impressed, upon the property of plaintiff, described in Paragraph IV of this petition, to secure the amounts which the Court may find to be due to petitioners, until such time as the amount adjudged by the Court to be due the petitioners is fully paid;

4. That such portion of said property as may be necessary to satisfy the judgment awarded to petitioners herein be sold according to law by a Commissioner appointed by this Court, free from any restriction upon the alienation thereof, and that the proceeds of such sale be applied to the payment of said judgment, and the balance of the proceeds of such sale, if any, be distributed to the plaintiff, or otherwise disposed of as the Court may direct;

5. That, if the Court shall not order said property sold, then and in that event that the Court appoint a receiver to take charge of, manage and operate said property, and to receive and disburse

the net income therefrom to the plaintiff and to the [10] Petitioners in such manner and in such amounts and at such times as the Court may order and direct;

6. That Petitioners have such other and further relief as to the Court may seem just and proper.

JOHN W. PRESTON,

OLIVER O. CLARK,

DAVID D. SALLEE,

By /s/ JOHN W. PRESTON,

Petitioners.

Acknowledgement of Service attached.

[Endorsed]: Filed Oct. 24, 1947. [11]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon reading and filing the Petition of John W. Preston, Oliver O. Clark and David D. Sallee, Esqs., for a supplemental decree for the allowance of attorneys' fees for services rendered by them to the above named plaintiff, Lee Arenas, and for expenses advanced by them for said plaintiff, in the above entitled cause, and for the sale of a sufficient portion of the lands allotted to said plaintiff to pay the amount of attorneys' fees that shall be awarded by the Court to said Petitioners and expenses advanced by them on behalf of said plaintiff, and it appearing to the satisfaction of the Court therefrom and also from the judgment heretofore rendered in this cause that the Court retained "jurisdiction over this

action and the subject matter thereof for the purpose of adjudicating the reasonable sums that shall be allowed and paid to the attorneys of record for plaintiff for their services rendered to him in this action and for expenses necessarily incurred by them in his behalf in the prosecution thereof, [13] and for the purpose of making all necessary and proper orders, judgments and decrees for the securing and payment of all such sums so found due and owing by the plaintiff to said attorneys'', that this is a proper case for the issuance of an order to show cause to the plaintiff, Lee Arenas, to appear in this Court and answer to said petition;

Now, Therefore, It Is Hereby Ordered that the plaintiff, Lee Arenas, be and appear before this Court in the courtroom of the Honorable Wm. C. Mathes, one of the Judges thereof, at the hour of 10 a.m., on the 16 day of December, 1947, then and there to show cause, if any he has, why attorneys' fees and expenses advanced by them should not be allowed and paid to the Petitioners, John W. Preston, Oliver O. Clark and David D. Sallee, Esqs., in the amounts prayed for and for other relief as set forth in their said Petition.

It Is Further Ordered that a copy of the Petition of John W. Preston, Oliver O. Clark and David D. Sallee and this order be served on the plaintiff, Lee Arenas, not later than the 15 day of November, 1947.

Dated this 24 day of October, 1947.

/s/ WM. C. MATHES,
Judge.

[Endorsed]: Filed Oct. 24, 1947. [14]

[Title of District Court and Cause.]

**SPECIAL APPEARANCE OF, AND MOTION
TO DISMISS BY, THE UNITED STATES
OF AMERICA.**

Comes Now the United States of America and appearing specially and solely for the purpose of this motion to dismiss and not otherwise, moves this Honorable Court to dismiss the Order to Show Cause in the above numbered and entitled proceedings heretofore noticed before this Court for 10:00 a.m. on December 16, 1947, in the courtroom of the Honorable Wm. C. Mathes, one of the Judges thereof, in so far as said Order to Show Cause, and the petition upon which it is based, are directed toward the procuring of an order, or orders, by this Court:

1. Affecting lands, the title to which is vested in the United States, to-wit, the lands described in paragraph IV of said petition.

2. Directing the sale of, or the sequestration of, said lands.

3. Appointing a receiver to take charge of, or to manage, or to operate, or in any manner to affect and supersede the lawful supervision and regulation of said lands by the United States, by and through the Secretary of the Interior of the United States.

4. Appropriating or sequestering, or otherwise affecting or disposing of the income from said lands, except as consented to and approved by the United States through the Secretary of the Interior of the United States.

5. Appropriating or sequestering the income from any business conducted upon said lands except as consented to and approved by the United States through the Secretary of the Interior of the United States.

6. Making any order herein, the effect of which would be to supersede the authority of the Secretary of the Interior of the United States, to determine what, if any, business ventures could be conducted upon said lands during the time title thereto is vested in the United States, or who may manage and control the same, or the effect of which would be to supersede, limit or impair present existing or future regulations of business activities upon such lands by the Secretary of the Interior of the United States.

7. Imposing, directly or indirectly, a judgment for costs, or attorney fees, or both, against property the title to which is vested in, or the supervision and control of which is exclusively entrusted to, the United States.

Said motion is made upon the following grounds:

1. That the United States has not submitted to the jurisdiction of this Court as to any of the foregoing matters; that this Court can obtain no jurisdiction over the United States as to such matters without its consent and that the United States is an indispensable party, as respondent to the petition and Order to Show Cause, in so far as they are directed to the foregoing matters.

2. That it is the established law of this case, by the final judgment of the Circuit Court of Appeals for the Ninth Circuit, that by consenting to the suit

to establish the rights of Lee Arenas to a trust patent to the lands involved in this proceeding, as provided in Title 25, Section 345, U.S.C., the United States has not consented to the imposition [16] of liability for costs or other expenses of litigation against it.

Said motion will be based upon the affidavit of Irl D. Brett, Esq. which is served herewith, together with the records and files in this proceeding and the statutory and case law applying thereto.

Dated: December 16th, 1947.

JAMES M. CARTER,
United States Attorney.

IRL D. BRETT,
Special Assistant to the Attorney General.

By /s/ IRL D. BRETT,
Attorneys for Defendant United States of America.

Acknowledgment of Service attached.

[Endorsed]: Filed Dec. 16, 1947. [17]

[Title of District Court and Cause.]

AFFIDAVIT OF IRL D. BRETT

State of California,
County of Los Angeles—ss.

Irl D. Brett, being first duly sworn, says:

I am a Special Assistant to the Attorney General of the United States, Lands Division, Department

of Justice, assigned to the office of James M. Carter, United States Attorney, at Los Angeles, and in such capacity am charged with the handling of the special appearance of, and motion to dismiss by, the United States of America in the above numbered and entitled proceeding in respect to the Petition for Supplemental Decree and the Order to Show Cause based thereon, which Order is returnable before this court on December 16, 1947, at 10 o'clock a.m.

That it appears from the Petition, and particularly from paragraphs IV and XI thereof, that the property which is the subject matter of said Petition and Order to Show Cause consists of Lots 46 and 47 in Section 14, Township 4 South, Range 4 East, S.B.B. & M., and certain portions of Section 26, Township 4 South, Range 4 East, S.B.B. & M., together with the income from a business [19] operation (motor court) located on a portion thereof; that by a conveyance executed by Grover Cleveland, President of the United States of America, dated May 14, 1896, and recorded in the General Land Office at Washington, D. C. in Volume 21, pages 231 to 233, inclusive, all of Sections 14 and 26, Township 4 South, Range 4 East, S.B.B. & M. were declared to be held by the United States of America in trust for the sole use and benefit of the Agua Caliente Band or Village of Mission Indians; that a true and correct copy of said Trust Patent is annexed to this affidavit, marked Exhibit 1, and by such reference incorporated herein as if herein set out in full; that at all times subsequent to said date

and to and including the date of this affidavit, said lands have been owned by the United States of America and held subject to said Trust Patent.

That it appears from the Petition for Supplemental Decree that it is based upon the provisions of a reservation in the Judgment made by the Honorable J. F. T. O'Connor, one of the Judges of this court, dated and entered on May 14, 1945 in Civil Order Book 32 at page 581, and identified and designated as paragraph VIII, which reservation is repeated and set forth verbatim in the Order to Show Cause, commencing on page 1, line 18, and ending on page 2, line 3; that the records, files, pleadings, briefs, and decisions rendered in connection with this proceeding disclose that no prayer for such reserved jurisdiction appeared in the original Complaint; that the original Judgment was in favor of the United States and was a summary judgment determining that the plaintiff was not entitled to any relief as against the United States; that the Order and Decree of the United States Supreme Court did not include or refer to such reservation of jurisdiction nor to the remedy sought by the Petition and Order to Show Cause (322 U.S. 419); that the first time such jurisdiction was prayed for was in paragraph 3 of the prayer of the Third Amended Complaint, in which plaintiff prayed:

“3. That plaintiff have such other and further relief as justice and equity may require including the costs of this action.”

That the Answer by the United States to the Third Amended Complaint objected to and denied

every form of relief as sought by plaintiff and concluded with a request for dismissal with costs; that in Finding XLIV the Court found: [20]

“XLIV

“That plaintiff in this action is what is known as a restricted Indian and as such is without plenary power in his own right to contract for the payment of Court costs, attorneys’ fees and other expenses necessarily incurred in the prosecution of this litigation and the Court, not having as yet determined the issues that will arise in this behalf, finds that this is a proper cause within which to retain jurisdiction for the purpose of determining and disposing of all issues which may arise concerning said subject matter.”

And in general Conclusion of Law No. XVII, the Court concluded:

“That the several attorneys for the plaintiff in this action have incurred expenses of considerable magnitude and have performed valuable services for the plaintiff in this action; that the power of plaintiff to contract for the payment of such expenses and for such services is restricted by law; that the present cause is a proper one for the Court to retain jurisdiction of the subject matter thereof for the purpose of hearing and determining all issues that appertain to the determination of the amount of such expenses and the value of such services and for the payment and discharge thereof and for such

orders in connection therewith as the Court of equity may deem meet and proper.”

That said Finding and Conclusion were attacked by the United States, which sought to strike the same in a document dated June 9, 1945, filed June 11, 1945, and entitled “Motion to Vacate Judgment and Conclusions and to Amend Findings of Fact”; that said motion was overruled by the court and paragraph VIII of the Judgment was included therein, as hereinabove alleged; that upon appeal from said judgment on December 20, 1945, the United States filed its Statement of Points on Appeal and included therein as Point 8 the following, to-wit: [21]

“8. That the District Court erred in holding that appellee is restricted by law from contracting for the payment of legal services and that the Court retained jurisdiction over this action for the purpose of adjudicating the reasonable sum that shall be allowed and paid to the attorneys of record for plaintiff for their services rendered to him in this action and for expenses necessarily incurred by them in his behalf in the prosecution thereof.”

That affiant does not have available to him the briefs upon appeal in the Circuit Court of Appeals upon the second appeal, which was from the judgment in which this reservation of jurisdiction is contained; but in the decision of the Circuit Court in the case of *United States of America vs. Lee Arenas*, 158 F. (2d) 730, at page 753, the Circuit Court expressly refers to the objections by the United States to said reserved jurisdiction, and holds that such

reservation does not affect the United States because by consenting to this action under Title 25, Section 345, U.S.C.A., the United States has not consented to the imposition of liability for costs or other expenses as against it, and that there is "neither internal nor external evidence that the Judgment reflects any such indication"; that neither in the Petition for Writ of Certiorari filed by Lee Arenas, nor the Conditional Cross-Petition filed by the United States, was any issue raised, argued, or submitted with respect to the reserved jurisdiction as set forth in paragraph VIII of said Judgment.

/s/ IRL D. BRETT,

Affiant.

Subscribed and sworn to before me this 16th day of December, 1947.

[Seal]

EDMUND L. SMITH,

Clerk, United States District Court, Southern District of California. [22]

EXHIBIT NO. 1

United States of America

To all to whom these presents shall come, Greeting:

Whereas it is provided by an Act of Congress entitled "An Act for the relief of the Mission Indians of the State of California" approved January twelfth Anno Domini one thousand eight hundred and ninety one (26 Stats 712) that "the Secretary of the Interior shall appoint three disinterested persons as Commissioners to arrange a just and satis-

factory settlement of the Mission Indians residing in the State of California upon reservations which shall be secured to them.

“Section 2. That it shall be the duty of said Commissioners to select a reservation for each band or village of the Mission Indians residing within said State, which reservation shall include, as far as practicable, the lands and villages which have been in the actual occupation and possession of said Indians and which shall be sufficient in extent to meet their just requirements, which selection shall be valid when approved by the Secretary of the Interior”.

“Section 3. That the Commissioners upon the completion of their duties shall report the result to the Secretary of the Interior, who, if no valid objection exists, shall cause a patent to issue for each of the reservations selected by the Commission and approved by him in favor of each band or village of Indians occupying any such reservation, which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented subject to the provisions of section 4 of this act, for the period of twenty-five years in trust, for the sole use and benefit of the band or village to which it is issued, and that at the expiration of said period the United States will convey the same or the remaining portion not previously patented in severalty by patent to said band or village discharged of said trust and free of all charges or incumbrance whatsoever.”

And Whereas it appears by a letter dated October

twenty-sixth, eighteen hundred and ninety-five from the Commissioner of Indian Affairs, and an order dated October twenty-eighth eighteen hundred and ninety-five from the Secretary of the Interior that a selection has been made by the Commissioners appointed [23] and acting under said act of Congress of January twelfth eighteen hundred and ninety one for the Agua Caliente band or village of Mission Indians covering sections twelve, fourteen, twenty-two, twenty-four, twenty-six and thirty-four of township four South, range four east, of the San Bernardino Meridian in the State of California containing three thousand eight hundred and forty four acres and eighty hundredths of an acre.

Now Know Ye, That the United States of America in consideration of the premises and in accordance with the provisions of the said Act of Congress approved January twelfth eighteen hundred and ninety-one, hereby declares that it does and will hold the said tracts of land selected as aforesaid (subject to all the restrictions and conditions contained in the said act of Congress of January 12, 1891) for the period of twenty-five years in trust for the sole use and benefit of the said Agua Caliente Band or Village of Mission Indians according to the laws of California and at the expiration of said period the United States will convey the same, or the remaining portion not patented to individuals, by patent to said Agua Caliente Band or Village of Mission Indians as aforesaid in fee simple discharged of said trust and free of all charge or incumbrance whatsoever.

Provided, That when patents are issued under the fifth section of said act of January twelfth, eighteen hundred and ninety-one in favor of individual Indians for lands covered by this patent they will override (to the extent of the land covered thereby) this patent, and will separate the individual allotment from the lands left in common, and there is reserved from the lands hereby held in trust for said Agua Caliente Band of Village of Mission Indians a right of way thereon, for ditches or canals, constructed by the authority of the United States.

In testimony whereof, I, Grover Cleveland, President of the United States of America have caused these Letters to be made Patent and the Seal of the General Land Office to be hereunto affixed. [24]

Given under my hand at the City of Washington this fourteenth day of May in the year of our Lord one thousand eight hundred and ninety six and of the Independence of the United States the one hundred and twentieth.

By the President, GROVER CLEVELAND

[Seal]

By M. McKEAN, Secretary

L. Q. C. Lamar, Recorder of the General Land Office, Recorded Vol. 21 pp. 231 to 233 inclusive.

Acknowledgment of Service attached.

[Endorsed]: Filed Dec. 16, 1947. [25]

[Title of District Court and Cause.]

ORDER DENYING DISMISSAL

The Petition for Supplemental Decree in the above entitled cause for Attorneys' fees and expenses advanced by Messrs. John W. Preston, Oliver O. Clark and David D. Sallee, attorneys for plaintiff Lee Arenas, came on to be heard on the 22nd day of December, 1947, upon the motion of the United States of America to dismiss said petition as to said defendant, filed by its said attorneys in said action, and the Court having heard the arguments of counsel for the United States and also for the Petitioners, and being fully advised in the premises, does hereby find that said motion to dismiss is not well taken and should be denied, without prejudice.

Wherefore, It Is Ordered, Adjudged and Decreed that said motion to dismiss be and the same is hereby denied without prejudice.

Done in Open Court Dec. 22, 1947.

/s/ WM. C. MATHES,
Judge.

Judgment entered Dec. 31, 1947.

Approved as to Form:

/s/ IRL D. BRETT,
For JAMES M. CARTER.
United States Attorney.

[Endorsed]: Filed Dec. 31, 1947. [27]

[Title of District Court and Cause.]

ANSWER TO PETITION AND ORDER TO
SHOW CAUSE IN RE SUPPLEMENTAL
DECREE FOR ATTORNEYS' FEES AND
EXPENSES ADVANCED FOR SALE OF
PROPERTY, AND FOR APPOINTMENT
OF RECEIVER.

Comes Now the United States of America, by direction of the Attorney General of the United States, and appearing specially in its own behalf, and appearing generally in its capacity as Guardian for plaintiff and respondent, Lee Arenas, and by virtue of its obligation to represent and defend said plaintiff and respondent, in answer to the petition of John W. Preston, Oliver O. Clark, and David D. Sallee, heretofore filed on October 24, 1947, and the Order to Show Cause directed to plaintiff and respondent, Lee Arenas, dated October 24, 1947, and reserving the objections heretofore set forth in the special appearance of, and motions to dismiss by, the United States of America, heretofore served and filed on December 16, 1947, which motion was denied without prejudice by [28] an Order of this Court dated December 24, 1947, at page 630 of Judgments, denies and alleges as follows:

I.

Alleges that the United States, by reason of the helpless and dependent character of the Palm Springs Band of Mission Indians, is the guardian

of, and has the exclusive control of, their property, including the lands and premises described in paragraph IV of the petition, and, by virtue thereof, there is imposed upon it the duty to do whatever matter be necessary for their guidance, welfare, and protection, and, particularly, for the guidance, welfare, defense and protection of Lee Arenas in connection with the lands aforesaid.

II.

That, to grant that portion of the petition which seeks to impose a lien upon and to involuntarily alienate the title to such restricted property; to interfere with, control, or otherwise affect or direct the management and control thereof; to impose judicial control upon the supervision and control of said property in said Indian reservation by the Secretary of the Interior of the United States and appoint a Receiver for said restricted property, except with the consent and approval of the Secretary of the Interior, is a violation of the governmental rights of the United States. That Lee Arenas is a restricted Indian ward of the United States, and by virtue of the Acts of Congress the property in controversy is restricted so that no interest in the property may in any way be encumbered or alienated without the consent of the Secretary of the Interior or unless the restrictions against the alienation are removed by the Secretary of the Interior; that it is in the governmental interest of the United States to enforce the restrictions against alienation imposed by Congress.

III.

That these answering respondents deny the allegations contained in paragraph II of said petition, except that it is admitted that a written document entitled "Agreement", dated November 20, 1940, was signed by David D. Sallee, and appears to bear the signature of Lee Arenas; that Lee Arenas is aged and infirm and has stated that he does not recall signing such document; that upon such ground these answering respondents deny that he signed the same. In this connection these respondents affirmatively allege that such agreement if executed by Lee Arenas, was solely between David D. Sallee and Lee Arenas, and provided, by its express terms, *inter alia*: [30]

"That the Party of the First Part hereby contracts with, retains and employs the Party of the Second Part as attorney in the matters hereinafter mentioned, subject to the approval of the Commissioner of Indian Affairs, and the Secretary of the Interior, pursuant to Section 2103 of the Revised Statutes of the United States of America.

"It Is Agreed that the said attorney is hereby authorized to associate with him in said work hereunder such assistants, including attorneys, as he may select, provided that the Government of the United States shall not be liable for any expenses;

"It Is Further Understood that in event the Party of the Second part, or his associates who are actually associated in the litigation and investigation as aforesaid, shall advance any necessary expenses, they shall be reimbursed by the Party of the

First Part, from the property recovered, such actual expenses as are strictly necessary or proper in connection with the printing of briefs, court costs for proceedings and other similar matters, and to include such actual and necessary traveling expenses, clerical hire, stenographic expense, and the like as may be properly required for the prosecution of said case, or cases; provided that all such expenditures shall be itemized and verified by the Party of the Second Part, and shall be accompanied by proper vouchers, and shall be paid only upon the approval of the Secretary of the Interior, or an officer designated by him who shall certify the same.

“It Is Further Understood And Agreed by and between the parties to this Agreement, that in event of a misunderstanding as regards the manner in which the compensation to the Party of the Second Part from the Party of the First Part shall be paid; and Trust Patents or receipts have been issued, and in [31] that event the Party of the First Part shall thereupon make application for a removal of restrictions upon sufficient of the premises to be sold, and from the proceeds of said sale or sales to pay said Party of the Second Part; that in event it is not for the best interests of the parties hereto to sell said land, the removal of restrictions shall be applied for upon properties coming to the First Party, as selected by said Second Party, upon the basis of one-tenth of the property—That is to say, Second Party shall select one property that does not exceed ten per cent of the total value of all properties, and that First Party shall select nine prop-

erties that do not exceed ninety per cent of the total value of said properties, and continue to make such selections until all property shall have been selected. That the property selected by the Second Party shall then be deeded to said Second Party, subject to the approval of the Secretary of the Interior and the Commissioner of Indian Affairs.

“And It Is Further Understood and agreed that no assignment of this contract, or any interest therein, shall be made without the consent previously obtained from the Commissioner of Indian Affairs, and the Secretary of the Interior, and that such assignment if made must comply with Section 2106 of the Revised Statutes of the United States.”

That although such agreement was tendered to the Commissioner of Indian Affairs and the Secretary of the Interior, it was not approved and, to the contrary, was expressly disapproved.

These respondents further allege in respect to said alleged agreement of November 20, 1940, that none of the conditions precedent heretofore quoted therefrom in this paragraph have been complied with by petitioners.

Further answering paragraph II of said Petition, these respondents deny that a new contract was entered into on February 1, 1945, [32] between Lee Arenas and these petitioners which superseded the alleged agreement of November 20, 1940. In this connection these respondents allege that if any such agreement was entered into on February 1, 1945, it was wholly prospective and contains no provision

whatsoever with respect to the alleged agreement of November 20, 1940.

These respondents admit that a document dated February 1, 1945, which Lee Arenas now states he has no recollection of executing, does contain the clause which is quoted and set forth in paragraph II of the petition on page 2, lines 14 to 18, inclusive; but further allege that said text is immediately followed, limited, and conditioned by the following sentence, to-wit:

“All to be subject to the rules and regulations of the Department of the Interior”;

that, if such agreement dated February 1, 1945, was made and is in effect, the conditions precedent, to-wit, that such agreement was to be subject to the rules and regulations of the Department of the Interior, have not been fulfilled, met, or tendered by petitioners.

Further answering paragraph II of said Petition, these respondents allege that at and prior to the time that the purported agreement dated February 1, 1945, was signed by respondent Lee Arenas, petitioners were obligated and bound by a firm contract, to-wit, the contract dated November 20, 1940, as follows:

“And it is also understood and agreed that the said attorney at law, (David D. Sallee), and his associates, if any, shall pursue the litigation in question to and through the court of final resort, unless authorized by the Secretary of the

Interior to terminate the proceedings at an intermediate stage thereof.”

That no such authorization was requested or obtained from the Secretary of the Interior; that the circumstances of this litigation were such that at the date when the agreement of November 20, 1940 was executed, and at all times thereafter, to and including February 1, 1945, these petitioners [33] and each of them then knew that the remedy then sought by respondent Lee Arenas and to perform which petitioner David D. Sallee had obligated himself, and his associates, would, of necessity, require a petition for certiorari in the Supreme Court of the United States, preparation of the necessary briefs and presentation of the necessary argument in support thereof and in support of an appeal in said Court if certiorari were granted, together with the prosecution through a court of final resort following the decision of the Supreme Court if such decision were favorable to respondent Lee Arenas and resulted in a reversal of the decision theretofore made in the so-called St. Marie case. That it was represented to respondent Lee Arenas, that said contract of November 20, 1940, did not include the obligations aforesaid and that the performance of services following the decision of the United States Circuit Court of Appeals after the first judgment in this proceeding, was an additional service which would justify and require additional compensation and, also, that at the time of the negotiation leading up to the execution of the document dated February 1, 1945, respondent Lee Arenas, was aged and infirm,

was then being represented as counsel by these petitioners and each of them, and did not have or receive independent legal advice as to the terms, provisions and obligations of the agreement dated November 20, 1940, particularly that said agreement specifically covered and provided for the compensation to be received by said attorney for pursuing the litigation through the court of final resort. That by reason of the aforesaid the agreement contained in the document dated February 1, 1945, is null and void.

IV.

Answering paragraph VI of the said petition, these respondents allege that the period of restriction on alienation is subject to extension annually by the President of the United States, for a period not to exceed twenty-five (25) years, and that each President of the United States, since the effective date of the act, has extended such period of restriction on alienation annually for an additional period of twenty-five [34] (25) years. That such authority is vested in the President under the provisions of Title 25, Section 391, U.S.C.

V.

Respondents deny the allegations contained in paragraph VII of said petition and allege that by reason of the restrictions upon alienation, and the limited right of user under existing laws, and the uncertainty as to when, if at all, the lands described in paragraph IV of the petition will ever be released from such restrictions, said lands have a value which is problematical and highly specula-

tive, the exact amount of which is not now known to respondents.

That, as to the rentals, by reason of existing laws and restrictions upon the use of the premises and upon the character of permit which can be granted in respect of such use, the rentals now being procured are the full amount that could be produced therefrom and the production of any increased rental or income must necessarily await the change or modification of such existing laws and restrictions upon the use thereof. That the time when such change or modification will be made and the nature and extent thereof and the effect thereof upon the possibilities for an increase of income from said restricted lands is, at this time, wholly conjectural and speculative.

VI.

Answering paragraph VIII, respondents have no information or belief respecting the allegations contained in paragraph VIII of the petition, and upon such ground deny the same.

Respondents further allege that if said amount has been expended by petitioners and has not been repaid, petitioners have not furnished proper items, vouchers, and verified and submitted them to the Secretary of the Interior or to any officer designated by him, for his approval and certification.

VII.

Answering paragraph X of the petition, these respondents deny the allegations contained therein.

VIII.

Answering paragraph XI, these respondents deny that portion thereof which alleges that the annual income could be increased in the hands of a competent manager; and further allege that this Court has no jurisdiction or control over the operation and management of such restricted property, but that the exclusive jurisdiction, control and management thereof is vested by Congress in the United States.

Respondents further deny that any portion of petitioners' compensation may be paid from the proceeds of a sale of said property or from a portion of the income derived therefrom except and until the restrictions now existing upon the alienation thereof have been removed, and that this Court does not have jurisdiction to order or require a sale or other alienation of, or the encumbrance of, said restricted real estate or the income derived therefrom.

IX.

Answering paragraphs XII, XIII, and XIV, respondents deny each and every allegation therein; but respondents admit that petitioners have performed valuable services for Lee Arenas and are entitled to recover a money judgment against him to the extent of ten per cent (10%) of the amount of the reasonable value of the restricted lands described in paragraph IV of the petition as of the date of the completion of this litigation when, but only when, they have completed and fulfilled such agreements, if any, as they may have made with him, including all conditions precedent, as therein provided; that they are not entitled, and this Court

has no jurisdiction to enter an order, judgment, or decree in their favor by which the lands described in paragraph IV of said petition, and the income derived therefrom, are alienated, transferred or encumbered, or by which order, judgment, or decree said lands or income is taken [36] from or placed beyond the exclusive management, operation and control of the United States of America by and through the Secretary of the Interior.

Wherefore, respondents pray:

1. That this Court find and determine that the Petition and Order to Show Cause are premature, in that petitioners have not fully performed and complied with the conditions precedent of their employment, and have not completed the work to be done by them, and that said Order to Show Cause be discharged;

2. That, if it be held that petitioners are entitled to any relief, such relief be limited to the Contract fee fixed in the agreement dated November 20, 1940, fixed in money and as a personal money judgment against respondent Lee Arenas only;

3. That, if it be determined that the agreement dated November 20, 1940, has been superseded by the agreement dated February 1, 1945, that the amount and value of the property described in paragraph IV of the Petition be fixed and determined as of February 10, 1948, or such other date as the Court shall determine as the date when petitioners shall have fully completed the obligations on their part to be performed, fixed in money and as a personal money judgment against respondent Lee Arenas only;

4. That it be ordered and decreed that petitioners are not entitled to affix a lien upon, or to an order for the disposition, alienation or sale of the restricted real property or the income derived therefrom and are not entitled to the appointment of a receiver or other ancillary relief as against said restricted property;

5. That the issues as to the value of the interest of Lee Arenas in the restricted property, be tried to a jury;

6. If the Court shall hold and determine that petitioners are to be paid on a different basis than the contract fee as provided in the agreement of November 20, 1940, that the reasonable value of the services of petitioners performed for respondent Lee Arenas in this proceeding, [37] be tried to a jury.

Dated: February 9th, 1948.

JAMES M. CARTER,
United States Attorney,
IRL D. BRETT,
Special Assistant to the Attorney General,

/s/ By **IRL D. BRETT,**
Attorneys for Respondents,
United States of America,
and Lee Arenas. [38]

Acknowledgment of Service attached.

[Endorsed]: Filed Feb. 9, 1948.

[Title of District Court and Cause.]

MOTION TO STRIKE CERTAIN TESTIMONY
OF WITNESSES JOSEPH A. GALLAGHER,
SR., and BENTON BECKLEY

Come Now respondents, Lee Arenas and United States of America, and move this honorable court to strike the opinions as to market value of the real properties which are the subject matter of this proceeding, as expressed and testified to under oath herein by the witnesses, Joseph A. Gallagher, Sr. and Benton Beckley. This motion is not directed to the other evidence and testimony of said witnesses but is solely directed to the opinions expressed by them, either orally or in writing, as to the fair market value of said lands.

Said motion is made upon the ground that both of said witnesses have inextricably included within the matters upon which they based their said opinions, certain matters which were wholly incompetent and inadmissible for such purpose, to-wit:

1. The use of the assessed value as evidence of market value;
2. The use of the assessed value of the land [40] and improvements indiscriminately as evidence of market value;
3. The use of an artificial mathematical calculation (multiplying assessed value by 5) as evidence of market value;
4. The total ignoring of zoning restrictions which, by law, would prevent the use of the subject

properties for business purposes, by assuming as an integral part of their basis for their opinions as to market value, alleged comparable properties which were zoned for business;

5. That in arriving at said opinions as to market value each of said witnesses fixed such value upon the basis of an adaptability for use for which said properties were not then available and which use was then prohibited by law.

Said motion will be based upon the records and files in this proceeding.

Dated: February 20, 1948.

JAMES M. CARTER,

United States Attorney,

IRL D. BRETT,

Special Assistant to the Attorney General,

/s/ By IRL D. BRETT,

Attorneys for Respondents.

Points and Authorities in Support of
Motion to Strike

1. Assessed value is incompetent as evidence of market value.

San Jose etc. R.R. vs. Mayne, 83 Cal. 566, 570;
23 Pac. 522, 523

Yolo Water etc. vs. Edmands, 50 Cal. App. 444,
450; 195 Pac. 463, 466

2. Market value must be determined by consideration only of the uses for which the land "is adapted and for which it is available" and may not

be based upon the assumption of what it would be worth if present existing conditions were changed.

Long Beach, etc. vs. Stewart, 30 A.C. 767, 771-772, 185 Pac. (2) 585, 587-588

3. The opinion of an expert witness as to market value should be stricken where it is based entirely upon incompetent and inadmissible matters or such matters are the chief elements in the calculations which lead him to such conclusions.

San Diego, etc. vs. Neale, 88 Cal. 50, 62; 25 Pac. 977, 980

Reclamation Dist. No. 730 vs. Inglin, 31 Cal. App. 495, 500; 160 Pac. 1098, 1101

Temescal Water Co. vs. Marvin, 121 Cal. App. 512, 522; 9 Pac. (2) 335, 339 [42]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE

I.

Assessed value is incompetent as evidence of market value.

“The court allowed the plaintiff, against the objections of the defendant, that the same were incompetent and irrelevant, to introduce in evidence certain statements signed by the defendant for the years 1884, 1885 and 1886. * * * The statements were evidently those required under Sections 3629 to 3633 of the Political Code. Nowhere in them, or in any other sections of that Code which have been called to our attention, is there any provision which

requires the person whose property is to be assessed, to fix the value thereof. The record here shows that such fixing of value, if made, was by the assessor, and not by the defendant. We cannot, therefore, perceive what relevancy the statements had to the question of the value of the land to be taken. They were not, in any way, declarations by the defendant as to the value of his land, and even if they have the same force and effect as an assessment roll made by the proper officer, they are inadmissible. The assessment of property for taxation being made for another purpose, and not at the instance of either party, and not usually at the market value of the property, is not admissible as evidence of value in condemnation proceedings.”

San Jose etc. R.R. vs. Mayne, 83 Cal. 566, 570;
23 Pac. 522, 523. [43]

“The valuation placed upon the property by the assessor is not evidence of market value.”

Yolo Water etc. vs. Edmands, 50 Cal. App. 444,
450; 195 Pac. 463, 466.

II.

Market value must be determined by consideration only of the uses for which the land “is adapted and for which it is available” and may not be based upon the assumption of what it would be worth if present existing conditions were changed.

[P. 770]: “Appellant first claims that there was error in the instructions given to the jury. He says: ‘We can state briefly that the error was in the in-

troductioin of the idea of availability as a basis for values.' In other words, appellant claims that in fixing the market value of the land, adaptability for any use should be considered by the jury, but that availability should not. Such obviously is not the law, for the jury should consider whether the land is or is not available for particular uses under existing zoning ordinances, as such availability does affect market value."

[P. 771]: "In *Central Pacific Railroad Co. vs. Pearson*, 35 Cal. 247, this court gave consideration to the matter of 'availability' when it was insisted that the value of certain land was enhanced by reason of potential wharf privileges. The court said at page 262: 'The testimony in relation to the value of wharf privileges on the shore of the Sacramento river, where the tide ebbs and flows, given for the purpose of enhancing the value of some of the land sought to be appropriated, was also improperly received, for the obvious reason that the party claiming the compensation had no wharf franchise. The mere fact that the party might at some future time obtain from the State a grant of a wharf franchise if allowed to remain the owner of the land, is altogether too remote and speculative to be taken into consideration. The question for the Commissioners to ascertain and settle was the present value of the land in its then condition, and not what it would be worth if something more should be annexed to it at some future time. (*Gould vs. The Hudson River Railroad Company*, 6 N.Y. 522)' "

[P. 772]: "The underlying principles upon which

the authorities are based are summarized in Nichols on Eminent Domain, second edition, volume 1, as follows: ‘* * * the compensation awarded when land is taken by eminent domain is the market value of the land for any use to which it is adapted and for which it is available.’ ”

[P. 774]: “Furthermore, in the present case, unlike the situation presented in the first Beverly Hills case (110 Cal. App. 626), there is nothing whatever in the record tending to show any ‘reasonable probability that the prohibition or restriction will be modified or removed in the near future.’ Neither industry nor business has been [44] invading the residential development in the involved area. The zoning ordinance classifying the property as residential was enacted only three years before the condemnation proceedings were started, and it clearly appears that the ordinance is in line with the natural development in such area. Nor is there the slightest suggestion that the ordinance was enacted for the purpose of defeating appellant in his just claims for compensation or that it was not enacted in the utmost good faith. In the words of the second Beverly Hills case (127 Cal. App. 223, 231), it would be ‘speculative to assume that a change in the provisions of the zoning ordinance is likely to occur.’ ”

Long Beach, etc. vs. Stewart, 30 A.C. 767, 771-772; 185 Pac. (2) 585, 587-588.

III.

The opinion of an expert witness as to market value should be stricken where it is based entirely

upon incompetent and inadmissible matters or such matters are the chief elements in the calculations which lead him to such conclusions.

“Appellants contend that the court did not err in refusing to strike out the testimony objected to, because the witnesses were competent to express an opinion as to value, and the reasons for such opinion can only affect the weight to be given to their testimony; but we think that where a witness bases his opinion entirely upon incompetent and inadmissible matters, or shows that such matters are the chief elements in the calculations which lead him to such conclusions, it should be rejected altogether.”

San Diego, etc. vs. Neale, 88 Cal. 50, 62; 25 Pac. 977, 980.

“* * * It follows, of course, that the court not only erred in allowing the question of sales of other lands and the prices paid for such lands to be gone into on the redirect examination of the witness, Kendall, but erred in refusing to grant the motion to strike out the testimony of said witness, it having been made clearly to appear from said testimony that the witness had based his opinion upon the question of value wholly upon incompetent matters. (San Diego Land etc. Co. vs. Neale, 88 Cal. 50, 63, [11 L.R.A. 604, 25 Pac. 977]; Pierson vs. Boston Elevated Ry., 191 Mass. 223, 233, 234, [77 N. E. 769].)”

Reclamation Dist. No. 730 vs. Inglin, 31 Cal. App. 495, 500; 160 Pac. 1098, 1101. [45]

“In *City of Stockton vs. Ellingwood*, supra, it is said: ‘The different elements considered by the witnesses, in giving their opinions as to market value may be inquired into on cross-examination, and if, upon such cross-examination, it appears to the court that the witness’ testimony is based upon improper consideration, or upon what is usually termed as speculative only, it should be stricken from the record or withdrawn from the consideration of the court or the jury.’

“Since, therefore, the opinion of the witness Hawgood as to the market value of the land sought to be condemned was based upon a consideration of the land as part of a completed project involving as it did the use of the land sought in conjunction with land of the respondent and with other land separate from the lands of appellants and respondents, a consideration, which we believe was improper, the action of the trial court in striking such an opinion from the record was proper.”

Temescal Water Co. vs. Marvin, 121 Cal. App. 512, 522; 9 Pac. (2) 335, 339. [46]

[Endorsed]: Filed Feb. 20, 1948.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Be It Remembered that John W. Preston, Oliver O. Clark and David D. Sallee, heretofore regularly petitioned the above entitled Court that a supple-

mental decree be made and entered herein, which should determine the amount of their reasonable compensation for services rendered to the plaintiff herein, and the amount of costs and expenses paid by said petitioners on behalf of the plaintiff herein, and for which reimbursement has not been made, and fixing the time for the payment thereof, and the manner of such payment, and the security thereof, and for appropriate ancillary relief in respect thereof, and that said petition, to which reference is hereby made for further particulars, came on regularly for hearing after proper notice to all persons interested therein, of the time and place of such hearing, before the above entitled Court, Honorable W. C. Mathes, judge thereof presiding, in the courtroom of said Court in the United States Post Office [47] Building at the northeast corner of Temple and Spring Streets, in the City of Los Angeles, County of Los Angeles, State of California, and on the 12th and 20th of February, 1948, and the 8, 29, 30 and 31st days of March, 1948;

And Be It Further Remembered that upon said hearing the Petitioners appeared personally and upon their own behalf; the United States of America appeared specially by Irl D. Brett, as Special Assistant to the Attorney General, Lands Division, Department of Justice of the United States of America, and Lee Arenas, the plaintiff herein appeared personally, and by said Irl D. Brett as such Special Assistant to the Attorney General, and by John J. Tahaney, an Attorney at Law and Solicitor;

Whereupon evidence, both oral and documentary,

was offered and received, and the cause was argued and submitted to the Court for decision, and

Now, Therefore, the Court being fully advised in the premises, makes these its findings of fact and conclusions of law herein, to wit:

FINDINGS OF FACT

I.

That Petitioners, Oliver O. Clark and David D. Sallee, were originally employed by plaintiff, Lee Arenas, as evidenced by a contract in writing of date November 20th, 1940, in evidence here as Petitioners' Exhibit No. 6, to represent him in all matters respecting an allotment of lands to him in the Palm Springs Reservation of the Agua Caliente Band of Mission Indians, in Riverside County, California.

II.

That said contract remained in force until about September 7th, 1943, at which time it was orally agreed between plaintiff [48] and said petitioners that said John W. Preston would be associated with said Oliver O. Clark and David D. Sallee in the performance thereafter of the duties undertaken by said Oliver O. Clark and David D. Sallee on behalf of plaintiff, as aforesaid, and that said petitioners should be compensated upon a quantum meruit basis for their said services, and should be reimbursed for all expenses incurred by them in behalf of plaintiff and members of his family. That said agreement is evidenced by a writing, which is petitioners' Exhibit Number 7 herein, and which was executed on or

about February 1st, 1945, and continued in force thereafter.

III.

That said petitioners, prior to the filing of their petition herein, fully performed, and completed, the duties of their said employment.

IV.

That each of the allegations contained in Paragraphs I, III, IV, V, VI, VIII, IX and X of the petition herein is true.

V.

That the lands allotted to said Lee Arenas, as aforesaid, and said Lee Arenas, are entitled to receive for domestic, agricultural and horticultural uses upon said lands, water from Tahquitz and Andreas Canyons in the mountains above said lands, proportionately with all other members of said Mission Band of Indians in respect of the land within said Indian reservation, and that the water available from said sources, for said purposes, is reasonably adequate therefor.

VI.

That the reasonable market value of said lands allotted [49] to said Lee Arenas, as aforesaid, and of said water rights, is uncertain, but, nevertheless, is very substantial.

VII.

That the petitioners Oliver O. Clark and David D. Sallee rendered and performed legal services for and on behalf of, and at the request of, and by agreement with the plaintiff in the above entitled

cause for which said petitioners are entitled to receive as compensation the reasonable value thereof; which reasonable value was and is ten per cent (10%) of the value of the lands allotted to Lee Arenas and Guadalupe Arenas under the allotment proceedings of 1927, and of said water rights incident to said lands, being the same lands described in Paragraph IV of the Petition filed by the petitioners herein as follows:

“Lands Allotted to Lee Arenas:

Parcel (a) Homesite: Lot 46, Section 14, Township 4 South, Range 4 East, S.B.B.&M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 39, Section 26, Township 4 South, Range 4 East, S.B.B.&M., comprising five (5) acres;

Parcel (C) Desert: $E\frac{1}{2}$ $SW\frac{1}{4}$ $NW\frac{1}{4}$ and $SE\frac{1}{4}$ $NW\frac{1}{4}$ $NW\frac{1}{4}$ and $SW\frac{1}{4}$ $NE\frac{1}{4}$ $NW\frac{1}{4}$ all in Section 26, Township 4 South, Range 4 East, S.B.B.&M., comprising forty (40) acres.

“Lands Allotted to Guadalupe Arenas:

Parcel (a) Homesite: Lot 47, Section 14, Township 4 South, Range 4 East, S.B.B.&M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 40, Section 26, Township 4 South, Range 4 East, S.B.B.&M., comprising five (5) acres;

Parcel (C) Desert: $SE\frac{1}{4}$ $NW\frac{1}{4}$ all in Section 26, Township 4 South, Range 4 East, S.B.B.&M., comprising forty (40) acres.” [50]

VIII.

That the petitioner John W. Preston rendered

and performed legal services for and on behalf of, and at the request of, and by agreement with the plaintiff in the above entitled cause for which said petitioner is entitled to received as compensation the reasonable value thereof; which reasonable value was and is twelve and one-half per cent ($12\frac{1}{2}\%$) of the value of the lands allotted to Lee Arenas and Guadalupe Arenas under the allotment proceedings of 1927, and of said water rights incident to said lands, being the same lands described in Paragraph IV of the Petition herein and in Paragraph VII of these Findings; and that said petitioner John W. Preston has advanced and paid out for said plaintiff, as necessary costs and expenses of said action sums aggregating Two Hundred Fifty-eight and 67/100 Dollars (\$258.67) for which said petitioner is entitled to reimbursement from said plaintiff.

IX.

That no part of the compensation, costs and expenses mentioned and described in Paragraphs VII and VIII of these Findings has been paid, and all thereof is now due and unpaid.

X.

That it is reasonable and equitable that until the compensation, costs and expenses due from the plaintiff to the petitioners, as described and set forth in Paragraphs VII and VIII of these Findings, are fully paid that petitioners be secured by an equitable lien upon the whole of the allotted lands and the water rights incident thereto and upon

twenty-two and one-half per cent (22½%) of the income therefrom in excess of the reasonable and necessary cost of operating said properties.

XI.

That it is reasonable and equitable that the plaintiff be [51] allowed, and have, a period of three months from and after the entry of judgment and decree herein within which to satisfy and discharge the equitable lien upon said allotted lands and the water rights incident thereto and upon that portion of the income therefrom, provided and set forth in Paragraph X of these Findings, and that any and all further proceedings by the petitioners for the enforcement and satisfaction of said equitable lien be stayed for a period of three months from and after the entry of judgment and decree herein.

From the foregoing facts, the Court concludes:

CONCLUSIONS OF LAW

I.

That the petitioners Oliver O. Clark and David D. Sallee are entitled to receive as compensation for their services to the plaintiff in the above entitled action ten per cent (10%) of the value of the lands allotted to Lee Arenas and Guadaloupe Arenas under the allotment proceedings of 1927 and of the water rights incident thereto, and to a judgment therefor.

II.

That the petitioner John W. Preston is entitled to receive as compensation for his services to the

plaintiff in the above entitled action twelve and one-half per cent ($12\frac{1}{2}\%$) of the value of the lands allotted to Lee Arenas and Guadalupe Arenas under the allotment proceedings of 1927 and of the water rights incident thereto, and said petitioner is also entitled to reimbursement from the plaintiff the sum of Two Hundred Fifty-eight and $67/100$ Dollars advanced by said petitioner as costs and expenses of suit, and to a judgment therefor.

III.

That the petitioners are entitled to an immediate, equitable [52] lien, to secure the payment of said compensation and to secure payment of the amount of Two Hundred Fifty-Eight and sixty-seven one-hundredths Dollars (\$258.67), paid by the Petitioner John W. Preston for the use and benefit of said plaintiff, upon the allotments made to Lee Arenas and Guadalupe Arenas under the allotment proceeding of 1927 and upon all rights conferred by said allotments, and upon the entire interest and estate of Lee Arenas and his heirs in the lands embraced within said allotments, and upon the entire interest in said lands in the hands of the United States of America, and upon twenty-two and one-half per cent ($22\frac{1}{2}\%$) of the income therefrom in excess of the reasonable and necessary operating expenses of said property until said compensation and said sum of Two Hundred Fifty-Eight and sixty-seven one-hundredths Dollars (\$258.67), shall be fully paid and satisfied.

IV.

That the Petitioner John W. Perston is entitled to judgment against the plaintiff for the sum of Two Hundred Fifty-Eight and sixty-seven one-hundredths Dollars (\$258.67) heretofore advanced by said Petitioners for the use and benefit of said plaintiff, and is entitled to an equitable lien to secure the payment thereof upon the lands allotted to the plaintiff and upon the income therefrom until said judgment is fully paid.

V.

That the plaintiff is entitled to, and shall be allowed, a period of three months from and after the entry of judgment and decree herein within which to satisfy and discharge the equitable lien allowed and granted to the petitioners, as provided and set forth in Paragraphs III and IV of these Conclusions of Law, and that any and all further proceedings by the petitioners for the enforcement and satisfaction of said equitable lien be stayed for a period of three months from and after the entry of judgment and decree herein. [53]

VI.

That it is proper that the Court should retain jurisdiction over this action, and the parties thereto, and the subject matter thereof in order to act upon and determine the time when, and the manner in which, and the method whereby, the payment of all or any part of the compensation and reimbursement for expenses hereby awarded shall be made or

further secured; and in order to require and compel the satisfaction and discharge, or enforcement, of the equitable lien awarded to the petitioners; and if necessary, for the determination of the money value of the legal services rendered and performed by the petitioners for and on behalf of the plaintiff in this action; and for the appointment of a Receiver or Commissioner to effectuate the judgment and decree herein, in accordance with the equitable jurisdiction, practice and procedure of this Court.

VII.

That the parties to this proceeding should pay their own costs, respectively, incurred herein.

Let judgment be entered accordingly.

Dated this 30th day of April, 1948.

/s/ WM. C. MATHES,
Judge.

Approved as to form as provided by local rule 7,
April 30, 1948.

/s/ IRL D. BRETT,
Special Assistant to the Attorney General.

Acknowledgment of Service attached.

[Endorsed]: Filed May 3, 1948.

[54]

In the District Court of the United States, Southern
District of California, Central Division

No. 1321 O'C—Civil

LEE ARENAS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT.

Be It Remembered that John W. Preston, Oliver O. Clark, and David D. Sallee, heretofore regularly petitioned the above entitled Court that a supplemental decree be made and entered herein, which should determine the amount of their reasonable compensation for services rendered to the plaintiff herein, and the amount of costs and expenses paid by said petitioners on behalf of the plaintiff herein, and for which reimbursement has not been made, and fixing the time for the payment thereof, and the manner of such payment, and the security thereof, and for appropriate ancillary relief in respect thereof, and that said petition, to which reference is hereby made for further particulars, came on regularly for hearing after proper notice to all persons interested therein, of the time and place of such hearing, before the above entitled Court, Honorable W. C. Mathes, judge thereof presiding, in the

courtroom of said Court in the United States Post Office Building at the northeast corner of Temple and Spring [56] Streets, in the City of Los Angeles, County of Los Angeles, State of California, on the 12th and 20th days of February, 1948, and the 8, 29, 30, and 31st days of March, 1948;

And Be It Further Remembered that upon said hearing the petitioners appeared personally and upon their own behalf; the United States of America appeared specially by Irl D. Brett as Special Assistant to the Attorney General, Lands Division, Department of Justice of the United States of America, and Lee Arenas, the plaintiff herein, appeared personally, and by said Irl D. Brett as such Special Assistant to the Attorney General, and by John J. Tahaney, as Attorney at Law and Solicitor;

Whereupon evidence both oral and documentary, was offered and received, and the cause was argued and submitted to the Court for decision, and the Court having made and filed its findings of fact and conclusions of law herein and ordered judgment in accordance therewith.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

First: That the petitioner John W. Preston, have and recover from the plaintiff, Lee Arenas, as reasonable compensation for the services rendered by said petitioner for and on behalf of said plaintiff in the above entitled action, twelve and one-half per cent ($12\frac{1}{2}\%$) of the value of the lands allotted to

Lee Arenas and Guadalupe Arenas under the allotment proceedings of 1927 and of the water rights incident to said lands, the same being more particularly described as follows, to wit:

“Lands Allotted to Lee Arenas:

Parcel (a) Homesite: Lot 46, Section 14, Township 4 South, Range 4 East, S.B.B.&M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 39, Section 26, Township 4 South, Range 4 East, S.B.B.&M., comprising five (5) acres; [57]

Parcel (C) Desert: $E\frac{1}{2}$ $SW\frac{1}{4}$ $NW\frac{1}{4}$ and $SE\frac{1}{4}$ $NW\frac{1}{4}$ $NW\frac{1}{4}$ and $SW\frac{1}{4}$ $NE\frac{1}{4}$ $NW\frac{1}{4}$ all in Section 26, Township 4 South, Range 4 East, S.B.B.&M., comprising forty (40) acres.

“Lands Allotted to Guadalupe Arenas:

Parcel (a) Homesite: Lot 47, Section 14, Township 4 South, Range 4 East, S.B.B.&M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 40, Section 26, Township 4 South, Range 4 East, S.B.B.&M., comprising five (5) acres;

Parcel (C) Desert: $SE\frac{1}{4}$ $NW\frac{1}{4}$ all in Section 26, Township 4 South, Range 4 East, S.B.B.&M., comprising forty (40) acres.”

Second: That said petitioner John W. Preston have and recover from the plaintiff, Lee Arenas, the sum of Two Hundred Fifty-eight and 67/100 Dol-

lars (\$258.67) heretofore paid by said petitioner for the use and benefit of said plaintiff in said action.

Third: That the petitioners Oliver O. Clark and David D. Sallee have and recover from the plaintiff, Lee Arenas, as reasonable compensation for the services rendered by said petitioners for and on behalf of said plaintiff in said action, ten per cent (10%) of the value of said allotted lands and of the water rights incident thereto.

Fourth: That the payment of the compensation awarded hereby to said petitioners John W. Preston, Oliver O. Clark and David D. Sallee, and the payment of said sum of Two Hundred Fifty-eight and 67/100 Dollars (\$258.67) heretofore paid by said petitioner John W. Preston for the use and benefit of said plaintiff, be and the same is hereby secured by an equitable lien upon the allotments made to Lee Arenas and Guadaloupe Arenas under the allotment proceedings of 1927 and upon all rights conferred by said allotments; and upon the entire interest and estate of Lee [58] Arenas and his heirs in the lands embraced within said allotments, being the lands described above in paragraph "First"; and upon the entire interest in said lands in the hands of the United States of America; and upon twenty-two and one-half per cent (22½%) of the income therefrom in excess of the reasonable operating expenses of said property; and said equitable lien shall be and continue in full force and effect until the compensation herein and hereby awarded to said petitioners, respectively, and said

sum of Two Hundred Fifty-eight and 67/100 Dollars (\$258.67) paid by said petitioner John W. Preston for the use and benefit of said plaintiff, shall be fully paid and satisfied.

Fifth: That the plaintiff be, and he hereby is, allowed and granted a period of three months from and after the entry of this judgment within which to satisfy and discharge the equitable lien herein and hereby allowed and granted to the petitioners, and any and all further proceedings by the petitioners for the enforcement of said lien be and the same are stayed for said period of three months from and after the entry of judgment and decree herein.

Sixth: The Court hereby retains jurisdiction over this action, and the parties thereto, and the subject matter thereof in order to act upon and determine the time when, and the manner in which, and the method, or methods whereby the payment of all or any part of the compensation and reimbursement for expenses hereby awarded to the petitioners shall be made or further secured; and in order to require and compel the satisfaction and discharge, or the enforcement of the equitable lien herein and hereby awarded to said petitioners; and if necessary, for the determination by the Court of the money value of the legal services rendered and performed by the petitioners for and on behalf of the plaintiff in this

action; and for the appointment of a Receiver or Commissioner to effectuate the judgment and decree herein, in [59] accordance with the equitable jurisdiction, practice and procedure of this Court.

Seventh: That the parties to this proceeding pay their own costs, respectively, incurred therein.

Dated this 30 day of April, 1948.

/s/ WM. C. MATHES,
Judge.

Approved as to form as provided by local rule 7.
April 30th, 1948.

/s/ IRL D. BRETT,
Special Assistant to the
Attorney General.

Judgment enter May 3, 1948.

Acknowledgement of Service attached.

[Endorsed]: Filed May 3, 1948. [60]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America and Lee Arenas hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment made and en-

tered herein on May 3, 1948, in C.O. Book 50 at page 488, in favor of John W. Preston, Oliver O. Clark and David D. Sallee, and from the whole thereof.

Dated: June 30, 1948.

JAMES M. CARTER,
United States Attorney,

IRL D. BRETT,
Special Assistant to the Attorney General,

/s/ By IRL D. BRETT,
Attorneys for Appellants, United States of America
and Lee Arenas. [62]

Acknowledgment of Service attached.

[Endorsed]: Filed June 30, 1948.

[Title of District Court and Cause.]

MOTION TO STRIKE PORTION OF TESTIMONY OF JOSEPH A. GALLAGHER, SR.

Come Now respondents Lee Arenas and United States of America and move this Honorable Court to strike the opinions as to the market value in fee of the real properties which are the subject matter of this proceeding, as expressed and testified to under oath herein by the witness, Joseph A. Gallagher, Sr., and as set forth in petitioners' Exhibit No. 14.

This motion is not directed to the other evidence and testimony of said witness but is solely directed to the opinions expressed by him, either orally or in writing, as to the fair market value of the fee simple title to said lands.

Said motion is made upon the following grounds:

1. That the market value of the fee simple title to such lands is immaterial to any issue involved in this hearing.

2. That the market value of the fee simple title to such lands is irrelevant to any issue involved in this hearing.

3. That evidence of the market value of the fee simple [63] title to such lands is incompetent in this proceeding.

4. That said witness has inextricably included within the considerations upon which he based his such opinions of the market value of the fee simple title to such lands, certain matters which were wholly incompetent and inadmissible and, by reason thereof, the opinion expressed are incompetent and inadmissible; such matters being:

- (a) The use of the assessed value of unimproved lands as evidence of market value;

- (b) The use of the assessed value of land and improvements indiscriminately as evidence of market value;

- (c) The use of an artificial mathematical calculation (multiplying assessed value by 5 and com-

puting the value of the four surrounding sections and dividing by 4) as evidence of market value;

(d) The use of the retail value of subdivided lots as the measure of the value of unsubdivided acreage;

(e) The assumption, as an integral part of his basis for his opinions as to market value, of a change in existing conditions and the fixing of the value as if such changes had taken place and in the then changed condition.

Such motion will be made upon the records and files in this proceeding, the reporter's transcripts of the proceeding and the Points and Authorities hereto annexed.

Dated: February 14, 1951.

ERNEST A. TOLIN,
United States Attorney,

IRL D. BRETT,
Special Assistant to the Attorney General,

/s/ By IRL D. BRETT,
Attorneys for Respondents [64]

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 16, 1951.

At a stated term, to wit: The February Term, A.D. 1951, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 16th day of February in the year of our Lord one thousand nine hundred and fifty-one.

Present:

The Hon. Wm. C. Mathes, District Judge.

[Title of Cause.]

MINUTE ORDER

For hearing oral argument on attorneys' fees after Mandate of Court of Appeals, Ninth Circuit; John W. Preston, Oliver O. Clark, David D. Sallee, Esqs., appearing as counsel for petitioners on question of attorneys' fees; John M. Ennis, Esq., appearing as counsel for plaintiff Lee Arenas, who is present; Irl D. Brett, Spec. Ass't to Att'y Gen'l, appearing as counsel for Gov't;

Filed motion of defendant to strike portion of testimony of Joseph A. Gallagher.

At 10:08 a.m. Attorney Preston argues for petitioners. Ex. S, a map, produced by petitioners, is admitted in evidence.

At 10:15 a.m. Attorney Brett argues for defendant U.S.A. and plaintiff Lee Arenas, and presents motion to strike portion of testimony of witness Joseph A. Gallagher, Sr. Court denies said motion. Court recesses.

At 11:10 a.m. court reconvenes herein and all being present as before, including counsel for both sides; Attorney Brett argues further; Attorney Ennis argues for plaintiff Lee Arenas.

Attorney Clark argues for petitioners. Court fixes fees of attorneys at \$90,000, and orders that they have lien therefor, and fixes three months in which to discharge equitable lien for amount awarded.

All provisions for enforcement of liens stayed six months. Court reserves jurisdiction. Petitioners to draw findings and judgment in five days pursuant to Local Rule 7.

Attorney Brett requests that the Court rule further.

Court makes its ruling on the Indians' interest.

[75]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Be it remembered that John W. Preston, Oliver O. Clark, and David D. Sallee heretofore regularly filed their petition in the above-entitled cause praying that the court make and enter a supplemental decree herein which should determine the amount of the compensation for services rendered by them to the plaintiff herein and the amount of costs and expenses paid by said petitioners on behalf of said plaintiff for which reimbursement has not been made by plaintiff, and fixing the time for the payment thereof and the manner of such payment and

the security thereof, and for appropriate ancillary relief in respect thereof; and that said petition came on regularly for hearing, after proper notice to all persons interested therein of the time and place of said hearing, before the above-entitled court, Honorable William C. Mathes, a Judge thereof, presiding, in the courtroom of said court in the United States Post Office Building at the northeast corner of Temple and North Spring Streets, in the City of Los Angeles, State of California, on the 7th and 16th days of February, 1951; [76]

Be it further remembered that upon said hearing the petitioners appeared personally and in their own behalf; the United States of America appeared by Ernest A. Tolin, Esq., United States Attorney, and Irl D. Brett, Esq., Special Assistant to the Attorney General, Lands Division, Department of Justice; and the plaintiff herein appeared personally and by John M. Ennis, Esq., as his personal attorney, and by the said Ernest A. Tolin, Esq., and Irl D. Brett, Esq., in their official capacities;

Whereupon, in accordance with the decision of the United States Court of Appeals for the Ninth Circuit, reported in *Arenas vs. Preston, et al.*, 181 F.2d 62, and the mandate issued pursuant to the judgment of said court in said cause, evidence, both oral and documentary, was offered and received, and the cause was submitted to the court for decision upon argument and briefs of respective counsel; and the court being fully advised in the premises, the following findings of fact and conclusions of law constituting the decision of the court in said pro-

ceeding for a supplemental decree, as aforesaid, are hereby made, to wit:

FINDINGS OF FACT

I.

That on or about the 20th day of November, 1940, the plaintiff, Lee Arenas, by an instrument in writing, employed petitioners Oliver O. Clark and David D. Sallee to represent him in all matters respecting an allotment of lands in severalty to him in the Palm Springs Reservation of the Agua Caliente Band of Mission Indians, in Riverside County, State of California.

II.

That on or about the 7th day of September, 1943, petitioner John W. Preston was likewise employed by the plaintiff, Lee Arenas.

III.

That said petitioners, prior to the filing of their [77] petition herein, fully performed and completed the duties of their said employment.

IV.

That each of the allegations contained in Paragraphs, I, IV, V, VI, IX and X of said petition is true. That the court makes no determination or finding as to who are the heirs at law of Guadalupe Arenas, deceased.

V.

That the lands which are described in Paragraph VIII hereafter following now have available to

them a sufficient supply of water for all uses to which said lands have now been put and to which they could be put to the extent now reasonably foreseeable.

VI.

That petitioners have not been paid, nor have they received, any sum whatsoever for the services rendered by them in this action. That petitioners have advanced for necessary expenses in prosecuting this action the sum of Two Hundred Fifty-Eight and 67/100 Dollars (\$258.67), no part of which has been paid or refunded to them. That all of said compensation and expenses are due and unpaid.

VII.

That the lands described in Paragraph IV of said petition for supplemental decree herein lie within or near the City of Palm Springs, County of Riverside, State of California, and are subject to restrictions against alienation during the trust period which, unless extended by Presidential order [78] will expire on or about the 9th day of May, 1952.

VIII.

That the reasonable market value of plaintiff's interest and estate in the allotted lands, under the trust patent decreed to the plaintiff by this Court, is as follows:

Value of Lands Allotted to Lee Arenas:

Parcel (a) Homesite: Lot 46, Section 14,

Township 4 South, Range 4 East,

S.B.M., comprising two (2) acres. . . . \$ 40,000.00

Parcel (b) Irrigated: Tract No. 39, Section 26, Township 4 South, Range 4 East, S.B.M., comprising five (5) acres \$66,000.00

Parcel (c) Desert: E $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ and SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ all in Section 26, Township 4 South, Range 4 East, S.B.M., comprising forty (40) acres..... 100,000.00

Value of Lands Allotted to Guadalupe Arenas:

Parcel (a) Homesite: Lot 47, Section 14, Township 4 South, Range 4 East, S.B.M., comprising two (2) acres.....\$ 40,000.00

Parcel (b) Irrigated: Tract No. 40, Section 26, Township 4 South, Range 4 East, S.B.M., comprising five (5) acres 66,000.00

Parcel (c) Desert: SE $\frac{1}{4}$ NW $\frac{1}{4}$ all in Section 26, Township 4 South, Range 4 East, S.B.M., comprising forty (40) acres 100,000.00

Total Market Value of said parcels
of land\$412,000.00

IX.

That the reasonable market value of the fee simple title of the allotted lands described in Paragraph VIII hereof is the same as the reasonable market value of plaintiff's interest in said allotted lands, to wit, the sum of Four Hundred and Twelve Thousand Dollars (\$412,000.00).

X.

That the petitioners John W. Preston, Oliver O. Clark and David D. Sallee rendered and performed legal services for and on behalf of, and at the request of, and by agreement with the plaintiff in the above-entitled cause for which said petitioners are entitled to receive as compensation the sum of Ninety Thousand Dollars (\$90,000.00), said amount being the reasonable value of said legal services. That no part of said amount has been paid to the petitioners, and all of said sum is due and unpaid.

XI.

That it is reasonable and equitable that until the compensation and expenses of suit due to the petitioners from the plaintiff, as described and set forth in Paragraphs VI and X of these Findings, are fully paid that the petitioners be secured by an equitable lien upon the whole of the lands allotted to the plaintiff, and to his wife, Guadaloupe Arenas, said lands being fully described in Paragraph VIII of these Findings.

XII.

That it is reasonable and equitable that the plaintiff be allowed a period of six (6) months from the date of the entry of the supplementary decree in this cause within which to pay the compensation and expenses of suit herein found to be due to the petitioners.

XIII.

That it is reasonable and equitable that if the plaintiff shall fail to pay the amounts found to be due and unpaid to said petitioners, the lands described in

Paragraph VIII hereof, or so much of [80] said lands as may be necessary, shall be sold to pay and satisfy the compensation and expenses of suit due from said plaintiff to said petitioners.

From the foregoing facts, the Court concludes:

CONCLUSIONS OF LAW

I.

That the petitioners John W. Preston, Oliver O. Clark, and David D. Sallee are entitled to receive as compensation for their services to the plaintiff in the above-entitled action the sum of Ninety Thousand Dollars (\$90,000.00), and the petitioners are also entitled to reimbursement from the plaintiff the sum of Two Hundred Fifty-Eight and 67/100 Dollars (\$258.67) advanced by said petitioners as costs and expenses of suit, and to judgment and decree for said compensation, costs and expenses.

II.

That the petitioners are entitled to an immediate equitable lien upon the lands allotted to plaintiff, said lands being fully described in Paragraph VIII of the foregoing Findings of Fact herein, to secure the payment of the compensation, costs and expenses of suit as described and set forth in Paragraph I of these Conclusions; and upon the entire interest of plaintiff and his heirs in said lands, if any, in the hands of the United States of America, until said compensation, costs and expenses shall be fully paid and satisfied.

III.

That the court should retain jurisdiction over this

action and the parties thereto and the subject matter thereof in order to act upon and determine the time when, and the manner in which, and the method whereby, a judicial sale of plaintiff's lands shall be made and the proceeds thereof distributed as set forth in Paragraph I of these Conclusions, and in order to require and compel the enforcement, or the satisfaction and discharge, of the equitable [81] lien awarded to the petitioners; and for the purpose of appointing a commissioner to make said sale and to distribute the proceeds thereof; and, generally, for the purpose of effectuating and enforcing fully the judgment and decree herein, in accordance with the equitable jurisdiction, practice and procedure of this court.

IV.

That the parties to this proceeding should pay their own costs, respectively, incurred herein.

Dated this 5th day of April, 1951.

/s/ WM. C. MATHES,
Judge.

Approved as to form:

/s/ ERNEST A. TOLIN,
United States Attorney,

/s/ IRL D. BRETT,
Special Assistant to the Attorney General,

/s/ By IRL D. BRETT,
Attorneys for the Defendant.

[Endorsed]: Filed April 5, 1951. [82]

United States District Court, Southern District of
California, Central Division

No. 1321—O'C—Civil

LEE ARENAS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT AND SUPPLEMENTAL DECREE

Be it remembered that John W. Preston, Oliver O. Clark, and David D. Sallee, heretofore regularly filed their petition in the above-entitled cause praying that the Court make and enter a supplemental decree herein which should determine the amount of the compensation for services rendered by them to the plaintiff herein and the amount of costs and expenses paid by said petitioners on behalf of said plaintiff for which reimbursement has not been made by plaintiff, and fixing the time for the payment thereof and the manner of such payment and the security thereof, and for appropriate ancillary relief in respect thereof; and that said petition, to which reference is hereby made for further particulars, came on regularly for hearing after proper notice to all persons interested therein of the time and place of said hearing, before the above-entitled Court, Honorable William C. Mathes, a Judge thereof, presiding, in the courtroom of said court in the United States Post Office Building at the

northeast corner of Temple and North Spring Streets, in the City of Los Angeles, State of [83] California, on the 7th and 16th days of February, 1951;

Be it further remembered that upon said hearing the petitioners appeared personally and in their own behalf; the United States of America appeared by Ernest A. Tolin, Esq., United States Attorney, and Irl D. Brett, Esq., Special Assistant to the Attorney General, Lands Division, Department of Justice, and the plaintiff herein appeared personally and by the said Ernest A. Tolin, Esq., and Irl D. Brett, Esq., in their said official capacities;

Whereupon, evidence, both oral and documentary, was offered and received, and the cause was submitted to the Court for decision upon briefs of respective counsel; and the Court having made and filed its findings of fact and conclusions of law and having ordered that judgment be entered in accordance therewith;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

First: That the petitioners John W. Preston, Oliver O. Clark, and David D. Sallee have and recover from the plaintiff, Lee Arenas, as reasonable compensation for the services rendered by said petitioners for and on behalf of said plaintiff in the above-entitled action the sum of Ninety Thousand Dollars (\$90,000.00).

Second: That the petitioners have and recover from the plaintiff the further sum of Two Hundred Fifty-eight and 67/100 Dollars (\$258.67) heretofore

paid by the petitioners for the use and benefit of the plaintiff in the above-entitled action.

Third: That the payment of the compensation awarded hereby to the petitioners John W. Preston, Oliver O. Clark, and David D. Sallee, and the payment of said sum of Two Hundred Fifty-eight and 67/100 Dollars (\$258.67) heretofore paid by said petitioners for the use and benefit of said plaintiff, be and the same is hereby secured by an equitable lien upon the lands allotted to said plaintiff under the allotment proceedings of 1927 and upon all rights conferred upon said plaintiff by said allotment [84] proceedings, and upon the entire interest and estate of said plaintiff and his heirs in said lands, and upon the entire interest, if any, in said lands in the hands of the United States of America; and said equitable lien shall be and continue in full force and effect until the compensation herein and hereby awarded to said petitioners, and until said sum of Two Hundred Fifty-eight and 67/100 Dollars (\$258.67) paid by said petitioners for the use and benefit of said plaintiff, shall be fully paid and satisfied. The lands allotted to said plaintiff, upon which said equitable lien is impressed by this judgment and supplemental decree, are situated in the Palm Springs Reservation of the Agua Caliente Band of Mission Indians, County of Riverside, State of California, and are more particularly described as follows, to wit:

Lands Allotted to Lee Arenas:

Parcel (a) Homesite: Lot 46, Section 14, Town-

ship 4 South, Range 4 East, S.B.M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 39, Section 26, Township 4 South, Range 4 East, S.B.M., comprising five (5) acres;

Parcel (c) Desert: $E\frac{1}{2}$ $SW\frac{1}{4}$ $NW\frac{1}{4}$ and $SE\frac{1}{4}$ $NW\frac{1}{4}$ $NW\frac{1}{4}$ and $SW\frac{1}{4}$ $NE\frac{1}{4}$ $NW\frac{1}{4}$ all in Section 26, Township 4 South, Range 4 East, S.B.M., comprising forty (40) acres.

Lands Allotted to Guadalupe Arenas:

Parcel (a) Homesite: Lot 47, Section 14, Township 4 South, Range 4 East, S.B.M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 40, Section 26, Township 4 South, Range 4 East, S.B.M., comprising five (5) acres;

Parcel (c) Desert: $SE\frac{1}{4}$ $NW\frac{1}{4}$ all in Section 26, Township 4 South, Range 4 East, S.B.M., comprising forty (40) acres, said six (6) tracts totaling ninety-four (94) acres, as shown by the Special Allotting Agent's Schedule of May 9, 1927.

Fourth: That the plaintiff, Lee Arenas, be and he is hereby allowed a period of six (6) months from and after the date [85] of the entry of judgment and supplemental decree herein within which to pay the compensation and expenses of suit awarded to the petitioners, as described and set forth in Paragraphs First and Second hereof.

Fifth: That if the said plaintiff shall fail to pay and fully satisfy the compensation and expenses of suit awarded to said petitioners, as described and

set forth in Paragraphs First and Second hereof, within six (6) months from the date of the entry of judgment and supplemental decree herein, then and in that event the lands allotted to said plaintiff, as described in Paragraph Third hereof, shall be sold pursuant to the further orders and directions of the Court and in the manner and form provided by the federal statutes, and the proceeds of such sale, or sales, shall be distributed as follows, to wit: (1) to pay the costs and expenses of sale, including fees of a commissioner to make such sale; (2) to the payment of the compensation and expenses of suit awarded hereby to said petitioners; and (3) the balance shall be paid to the United States of America in trust for the plaintiff.

Sixth: The Court hereby retains jurisdiction over this action and the parties thereto and the subject matter thereof, in order to act upon and determine the time, or times, when and the manner in which, and the method, or methods, whereby said allotted lands shall be sold and the payment of the compensation and expenses of suit hereby awarded to said petitioners shall be made to them, and in order to require and compel the enforcement, satisfaction and discharge of the equitable lien herein and hereby awarded to the petitioners, and in order to make and confirm a sale of said lands of the plaintiff, and to make distribution of the proceeds of said sale to the parties thereto as hereinabove provided, and in order to fully effectuate and enforce the judgment and supplemental decree herein in accordance with

the equitable [86] jurisdiction, practice and procedure of this court.

Seventh: That no determination is made herein as to who are the heirs at law of Guadalupe Arenas, deceased.

Eighth: That the parties to this proceeding pay their own costs, respectively, incurred herein.

Dated this 5th day of April, 1951.

/s/ WM. C. MATHES,
Judge.

Judgment entered 4/6/51.

[87]

[Endorsed]: Filed April 5, 1951.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL AND MOTION
TO AMEND FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND JUDG-
MENT, PURSUANT TO RULE 52, F.R.C.P.

Comes Now the United States of America, defendant in the above entitled action, and moves this Court for an Order setting aside the Findings of Fact and Conclusions of Law dated April 5, 1951, and the Judgment and Supplemental Decree entered thereon April 6, 1951, granting to the plaintiff and United States of America, as defendant, a new trial in the above entitled action as to the Judgment in favor of the petitioners, John W. Preston, Oliver O. Clark, and David D. Sallee, for attorneys' fees and

expenses, upon the following grounds and for the following reasons, to-wit:

1. Insufficiency of the evidence to justify the Findings of Fact;
2. Error in law occurring at the trial;
3. That the said Findings of Fact and Judgment are against the law.

That the said Motion will be based on the pleadings and papers on file upon the Minutes of the Court, the Court Reporter's transcript [88] of the testimony, and upon all the pleadings and papers on file in this proceeding, including all exhibits offered and received in evidence.

And pursuant to Rule 52 F.R.C.P., the United States of America further moves, in the event the Motion for New Trial is denied, to amend the aforesaid Findings of Fact and Conclusions of Law and the aforesaid Judgment and Supplemental Decree thereon, in the following particulars, to-wit:

I.

To amend Finding of Fact No. X to read as follows:

“That the petitioners John W. Preston, Oliver O. Clark, and David D. Sallee rendered and performed legal services for and on behalf of, and at the request of, and by agreement with, the plaintiff in the above entitled cause, for which said petitioners are entitled to receive as compensation 221½ per cent of the reasonable market value of the allotted lands described in paragraph VIII hereof, up to, but not exceeding, the sum of \$90,000.00

herein; that no part of said compensation has been paid to the petitioners, and all of said compensation is due and unpaid.”

II.

To amend Conclusion of Law No. I to read as follows:

“That the petitioners John W. Preston, Oliver O. Clark, and David D. Sallee are entitled to receive as compensation for their services to the plaintiff in the above entitled action $22\frac{1}{2}$ per cent of the reasonable market value of the allotted lands described in paragraph VIII hereof, up to, but not exceeding, the sum of \$90,000.00; and the petitioners are also entitled to reimbursement from the plaintiff the sum of \$258.67, advanced by said petitioners as costs and expenses of suit [89] and to judgment and decree for said compensation, costs and expenses.”

III.

To Amend paragraph First of the Judgment and Supplemental Decree to read as follows:

“First: That the petitioners John W. Preston, Oliver O. Clark, and David D. Sallee have and recover from the plaintiff, Lee Arenas, as reasonable compensation for the services rendered by said petitioners for and in behalf of said plaintiff in the above entitled action, a sum equivalent to $22\frac{1}{2}$ per cent of the reasonable value of the plaintiff's interest and estate in the allotted lands under the trust

patent decreed to the plaintiff by this Court, up to, but not exceeding, the sum of \$90,000.00.”

Dated: April 16, 1951.

ERNEST A. TOLIN,

United States Attorney,

IRL D. BRETT,

Special Assistant to the Attorney General,

/s/ By A. WEYMANN,

Special Attorney, Lands Division

Department of Justice,

Attorneys for Defendant, United States of America. [90]

Acknowledgment of Service attached.

[Endorsed]: Filed April 16, 1951.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

The motion of the United States of America and Lee Arenas for a new trial in the above entitled action of the issue as to attorney fees and expenses pursuant to the mandate of the Court of Appeals for the Ninth Circuit, as reported in *Arenas vs. Preston*, 181 Fed. (2d) 62, having been regularly continued for hearing before this court on Monday, May 7, 1951, at the hour of ten o'clock a.m. and having come on regularly for hearing before the Honorable Wm. C. Mathes in Court Room No. 2, second

floor, United States Post Office and Court House Building, at Los Angeles, California, in the forenoon of said date, the United States of America being represented by Irl D. Brett, Esq., Special Assistant to the Attorney General; petitioners being represented by John W. Preston, Esq., and the private counsel of Lee Arenas, John M. Ennis, Esq., being present, though not participating in the argument; and the cause having been submitted to the court for consideration and decision, upon the Specification of Errors and Points and Authorities served and filed by the moving parties, and upon oral argument by respective counsel, [92]

It Is Ordered that the motion for new trial be and it is hereby denied.

Done in open Court May 7, 1951.

/s/ WM. C. MATHES,
Judge of U. S. District Court.

Presented by:

ERNEST A. TOLIN,
United States Attorney,
IRL D. BRETT,
Special Assistant to the Attorney General,

/s/ By IRL D. BRETT,
Attorneys for Defendant, United States of America.

Approved as to form:

/s/ JOHN W. PRESTON,
Attorney for Petitioners. [93]

[Endorsed]: Filed May 22, 1951.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO AMEND
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND JUDGMENT

The motion of Lee Arenas and the United States of America pursuant to Rule 52(b), R.C.P. that, in the event their motion for new trial is denied, the Findings of Fact and Conclusions of Law and Judgment be amended in the particulars recited and set forth in said Motion to Amend, having come on regularly for hearing before the court on Monday, May 7, 1951, in the forenoon, and the court having heretofore denied the motion for new trial by the same parties, there being present Irl D. Brett, Esq., Special Assistant to the Attorney General, representing the United States of America, John W. Preston, Esq., representing the petitioners, and John M. Ennis, Esq., representing Lee Arenas as his private counsel; and the cause having been submitted to the court for consideration and decision, upon the Specification of Errors and Points and Authorities heretofore served and filed by the moving parties and upon argument of respective counsel, and the petitioners having objected to such amendment, the Court has determined that under the mandate of the Court of Appeals for the Ninth Circuit, arising out of the decision of that court which is reported in *Arenas vs. Preston, et al.*, 181 Fed. (2d) 62, it is not within the power and authority of the court [95] to so modify the Findings of Fact, Conclusions of Law, and Judgment over

the objection of petitioners, such motion is upon that ground and for such lack of authority and power, denied.

Done in open Court May 7, 1951.

/s/ WM. C. MATHES,

Judge of U. S. District Court.

Presented by:

ERNEST A. TOLIN,

United States Attorney,

IRL D. BRETT,

Special Assistant to the Attorney General,

/s/ By IRL D. BRETT,

Attorneys for Defendant United States of America. [96]

[Letterhead of John W. Preston]

May 9, 1951

[Stamped]: Received May 10, 1951, Lands Division, Los Angeles, California.

Irl D. Brett, Esq., Special Assistant to the Attorney General, Lands Division, 807 U. S. Post Office and Court House Building, Los Angeles 12, California.

In re Lee Arenas vs. United States of America No. 1321-WM Civil

Dear Irl:

I have your favor of May 7th relative to the formal orders in the above-entitled cause.

I have signed the approval as to the motion for a new trial; the other I have not signed, nor have I

approved, because I do not think that it is a proper insertion in such an order. The function of the court is to grant or deny, and attempting to limit itself, in my opinion is not the proper thing to do. You can state to Judge Mathes that I have declined to approve the same as to form or otherwise.

Yours truly,

/s/ John W. Preston

JWP:eb—Encs.

[98]

[Endorsed]: Filed May 22, 1951.

United States District Court, Southern District of
California, Central Division

No. 1321—WM—Civil

LEE ARENAS,

Plaintiff and Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant and Appellant,

and

JOHN W. PRESTON, OLIVER O. CLARK and

DAVID D. SALLEE,

Petitioners and Appellees.

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America and Lee Arenas hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Judgment and Supplemental Decree made and entered herein on April 6, 1951 in Judg-

ment Book 71 at page 729, in favor of John W. Preston, Oliver O. Clark and David D. Sallee, petitioners, and against Lee Arenas, plaintiff and respondent, and the United States of America, defendant and respondent, and from the whole thereof.

Dated: July 20, 1951.

ERNEST A. TOLIN,

United States Attorney,

IRL D. BRETT,

Special Assistant to the Attorney General,

/s/ By IRL D. BRETT,

Attorneys for Appellants. [99]

[Endorsed]: Filed July 20, 1951.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The United States of America and Lee Arenas, appellants in the above-entitled cause, submit the following statement of points which will be relied upon on appeal:

1. The Court erred in assuming jurisdiction to determine the petition for attorneys' fees and moneys advanced as expenses of suit in this proceeding;

2. The Court erred in finding, concluding and adjudging that petitioners were entitled to an equit-

able lien upon the trust patent allotments to secure the payment of attorneys' fees and moneys advanced as expenses of suit, and in failing to find and conclude that it was without jurisdiction to impose such a lien;

3. The Court erred in finding, concluding and adjudging that the lands involved should be sold at public auction [100] to satisfy the lien in the event that the judgment for fees and expenses should not be paid, and in failing to find that it was without jurisdiction so to do;

4. The Court erred in basing the award of compensation upon the market value of the full fee title to the lands involved rather than upon the market value of the Indian's interest therein;

5. The finding (Finding No. IX) that the value of the fee simple title to the lands involved was the same as the value of the Indian's interest therein is not supported by the evidence and is contrary to the evidence in the case;

6. The values found for the Indian's interest in the various parcels of the allotment (Finding No. VIII) are excessive and not supported by competent evidence;

7. The Court erred in denying the motions to strike the opinions of value expressed by petitioners' witnesses Gallagher and Beckley;

8. The Court erred in denying the Government's motion for a new trial;

9. The Court erred in denying the Government's alternative motion to amend findings of fact, conclusions of law and the judgment to provide for

recovery measured by a percentage of the value of the allotment, up to but not exceeding the amount awarded.

Dated: August 6, 1951.

ERNEST A. TOLIN,

United States Attorney,

IRL D. BRETT,

Special Assistant to the Attorney General,

/s/ By IRL D. BRETT,

Attorneys for Appellants. [101]

Affidavit of Service by Mail attached.

[Endorsed] Filed Aug. 6, 1951.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

The United States of America and Lee Arenas, appellants in the above entitled cause, designate the following for inclusion in the record on appeal:

1. Petition for Supplemental Decree, etc., filed October 24, 1947;
2. Order to Show Cause, filed October 24, 1947;
3. Special appearance of, and motion to dismiss by, the United States, filed December 16, 1947;
4. Affidavit of Irl D. Brett, including Exhibit No. 1 thereto, filed December 16, 1947;
5. Order denying dismissal, filed December 31, 1947;

6. Answer to petition and order to show cause, filed February 9, 1948;

7. Motion to strike valuation opinions of petitioners' witnesses Gallagher and Beckley, filed February 20, 1948; [102]

8. Transcript of proceedings on March 31, 1948 (oral opinion of the Court);

9. Findings of Fact and Conclusions of Law, filed May 3, 1948;

10. Judgment, filed May 3, 1948;

11. Notice of Appeal by the United States and Lee Arenas, filed June 30, 1948;

12. Opinion of the United States Court of Appeals for the Ninth Circuit in C. A. No. 12046, filed March 23, 1950;

13. Judgment of the United States Court of Appeals for the Ninth Circuit in C. A. No. 12046, filed March 23, 1950;

14. Motion to strike the valuation opinion of petitioners' witness Gallagher, filed February 16, 1951;

15. Minute entry of February 16, 1951, showing denial of motion to strike the valuation opinion of petitioners' witness Gallagher;

16. Findings of Fact and Conclusions of Law, filed April 5, 1951;

17. Judgment and Supplemental Decree, filed April 5, 1951, and entered April 6, 1951;

18. Motion for new trial and motion to amend findings of fact, conclusions of law, and judgment, filed April 16, 1951;

19. Order denying motion for new trial, filed May 22, 1951;

20. Order denying motion to amend findings of fact, conclusions of law, and judgment, filed May 22, 1951;

21. Notice of appeal, filed July 20, 1951;

22. The following portions of the transcript of the proceedings in 1948; [103]

(a) Volume I, page 53, line 20, to page 158, line 16, being the entire testimony of Joseph A. Gallagher on February 11 and 12, 1948;

(b) Volume I, page 158, line 19, to page 168, line 19, being the entire testimony of Benton Beckley on February 12, 1948;

(c) Volume III, page 358, line 16, to page 360, line 1, being statements made on February 20, 1948, with reference to the Government's motion to strike the opinions expressed by Gallagher and Beckley;

(d) Volume III, page 402, line 20, to page 412, line 5, being the argument on the motion to strike and the ruling of the court on March 29, 1948;

23. The entire transcript of the proceedings on February 7, 1951;

24. The excerpt of the proceedings on February 16, 1951, relating to the admission in evidence of Exhibit S;

25. The transcript of the proceedings on May 7, 1951, being the argument and ruling on the motion for new trial and motion to amend findings, etc.;

26. The following exhibits: Petitioners' Exhibits Nos. 6, 6-A, 7, 14 (including all maps and photographs therewith), 14-A, 14-B, and 17; Respondents'

Exhibits A, B, C, F, G, H, I, J, N (filed February 17, 1951) O, P, Q, R, and S;

27. Statement of Points on appeal;

28. This designation of record.

Dated: August 6, 1951.

ERNEST A. TOLIN,

United States Attorney,

IRL D. BRETT,

Special Assistant to the Attorney General,

/s/ By IRL D. BRETT,

Attorneys for Appellants. [104]

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 6, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF IRL D. BRETT IN SUPPORT
OF APPLICATION FOR ORDER ENLARG-
ING TIME TO FILE THE RECORD ON
APPEAL AND DOCKET THE ACTION
[R. C. P. 73(g)]

United States of America,
Southern District of California—ss.

Irl D. Brett, being first duly sworn, says:

I am one of the attorneys for appellants, United States of America and Lee Arenas, in the above numbered and entitled cause. That on July 20, 1951 said appellants filed Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from

the Judgment and Supplemental Decree made and entered herein on April 6, 1951 in Judgment Book 71 at page 729, in favor of petitioners and appellees, John W. Preston, Oliver O. Clark and David D. Sallee, and against the above named appellants.

That on August 6, 1951 appellants filed their Designation of the Record and their Statement of Points on Appeal; that appellees have filed no counter-designation. That included in the items designated in the Designation of the Record are writings which were included in the Record on Appeal in a companion case entitled "Eleuteria Brown Arenas, [106] also known as Della Nicholson, plaintiff, vs. United States of America, defendant", No. 6221-PH Civil, in which the Notice of Appeal to the Court of Appeals for the Ninth Circuit was filed on May 1, 1951 and in which the Record on Appeal was filed and docketed as No. 12962 on June 7, 1951.

That in order for the Clerk of this Court to certify the record on this appeal it is necessary that the instruments included in the Record on Appeal in case No. 6221-PH Civil be returned to him by the Clerk of the Court of Appeals. That affiant has been endeavoring to effect such arrangement but has not completed the same and unless extended by this Court under 73(g), R.C.P., the time for filing the Record on Appeal and docketing this action in the Court of Appeals will expire on August 29, 1951.

That Hon. Edmund L. Smith, Clerk of this Court, has estimated and suggested to affiant that it will require an additional thirty (30) days beyond such

date for him to prepare, certify, file and docket the record herein.

Upon the basis of such estimate and suggestion affiant respectfully prays that this Honorable Court make an order enlarging the time to file the record on this appeal and docket the action in the Court of Appeals for the Ninth Circuit, to and including September 28, 1951.

/s/ IRL D. BRETT,

Subscribed and sworn to before me this 24th day of August, 1951.

[Seal]

EDMUND L. SMITH,

Clerk, United States District Court, Southern District of California.

[107]

Acknowledgment of Service attached.

[Endorsed]: Filed Aug. 24, 1951.

[Title of District Court and Cause.]

ORDER ENLARGING TIME FOR FILING
RECORD ON APPEAL AND DOCKETING
THE ACTION [R. C. P. 73(g)]

Upon application of the United States of America in its own behalf and in behalf of Lee Arenas, as appellants, and the affidavit of Irl D. Brett, one of the attorneys of record for appellants, and good cause appearing therefor,

It Is Ordered that the time for the filing of the Record on Appeal and the docketing of this action in the Court of Appeals for the Ninth Circuit, pursuant to the appeal filed by appellants, United

States of America and Lee Arenas, on July 20, 1951, and the Designation of the Record and the Statement of Points on Appeal by such appellants, filed August 6, 1951, be, and the same is, hereby extended to and including September 28, 1951.

Dated: August 24, 1951.

/s/ WM. C. MATHES,

United States District Judge.

Presented by:

ERNEST A. TOLIN,

United States Attorney,

IRL D. BRETT,

Special Assistant to the Attorney General,

/s/ By IRL D. BRETT,

Attorneys for Appellants. [108]

Acknowledgment of Service attached.

[Endorsed]: Filed Aug. 24, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 108, inclusive, contain the original Petition for Supplemental Decree for Attorneys' Fee and Expenses Advanced, for Sale of Property and for Appointment of Receiver; Order to Show Cause; Special Appearance of, and Motion to Dismiss by, The United States of America; Affidavit of Irl D. Brett; Order Denying Dismissal; Answer to Petition and Order to Show Cause in re Supplemental Decree for Attorneys' Fees and Expenses Advanced, for Sale of Property and for Appointment of Receiver; Motion to Strike Certain Testimony of Witnesses Joseph A. Gallagher, Sr., and Benton Beckley; Findings of Fact and Conclusions of Law filed May 3, 1948; Judgment filed May 3, 1948; Notice of Appeal filed June 30, 1948; Motion to Strike Portion of Testimony of Joseph A. Gallagher, Sr.; Findings of Fact and Conclusions of Law filed April 5, 1951; Judgment and Supplemental Decree filed April 5, 1951; Motion for New Trial and Motion to Amend Findings of Fact and Conclusions of Law and Judgment; Order Denying Motion for New Trial; Order Denying Motion to Amend Findings of Fact, Conclusions of Law and Judgment; Notice of Appeal filed July 20, 1951; Statement of Points on Appeal; Designation of Record on Appeal and Application and Order Ex-

tending Time to Docket Appeal and a full, true and correct copy of minute order entered February 16, 1951 which, together with copy of reporter's transcripts of proceedings on February 10, 11, 12 and 20, 1948, March 9, 1948, March 29 and 30, 1948, March 31, 1948, February 7 and 16, 1951 and May 7, 1951 and original Petitioners' Exhibits 6, 6-A, 7, 14, 14-A, 14-B and 17 and Respondents' Exhibits A, B, C, F, G, H, I, J, N, O, P, Q, R and S, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 17th day of September, A.D. 1951.

[Seal]

EDMUND L. SMITH,

Clerk

/s/ By THEODORE HOCKE,

Chief Deputy.

In the United States District Court, Southern
District of California, Central Division

Honorable William C. Mathes, Judge presiding.

No. 1321—O'C—Civil

LEE ARENAS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, Calif., Tuesday, Feb. 10, 1948

Appearances:

For Petitioners in Pro Per: John W. Preston,
Esq., Oliver O. Clark, Esq., and David D.
Sallee, Esq.

For Respondents: Jerry Geisler, Esq., Meyer M.
Willner, Esq., and H. L. Thompson, Esq. (sub-
stituted for Messrs. Geisler, Willner and
Thompson), John H. Taheny, Esq., and Horace
A. Hibert, Esq., Irl D. Brett, Esq., Spec.
Asst. to the Attorney General of the United
States. [1*]

(Volume I, page 18, lines 4 to 18 (2-10-48):

The Court: Very well. Under the stipulation, as I
understand it now, the testimony given under oath
and the Interrogations will be deemed, for the purpose
of this proceeding, as given under oath from the wit-

* Page numbering appearing at top of page of original Reporter's
Transcript of Record.

ness stand here, and the documents attached as Exhibits 1, 2, and 3, introduced in evidence in support of such testimony.

The letters attached to the Interrogations, marked Exhibits 1, 2, and 3, respectively, are received in evidence and will be marked here Exhibits 1, 2, and 3 in evidence. The Interrogations are received in evidence.

Mr. Preston: Better take the letter "A," hadn't they?

The Court: The letters will be marked Petitioners' Exhibits 1, 2, and 3; the Interrogations, marked Petitioners' Exhibit 4; the stipulation will be received into evidence and will be marked Petitioners' Exhibit 5.

[Printer's Note: Petitioner's Exhibits 1, 2, 3 and 4 are set out at pages 463-516, Exhibit 5 at page 528 of this printed record.]

(Volume I, page 26, line 11, to page 29, line 16 (2-10-48):

Mr. Preston: We next offer in evidence, may it please the court, a document prepared by me on the data furnished by the respective petitioners, entitled Statement of Facts, a document referred to in the Interrogations Exhibit No.— what is the Interrogations?

The Court: 4 [2]

Mr. Preston: —Exhibit No. 4, a copy of which was exhibited at that time to counsel for the Government and for Lee Arenas. Do you need another copy of it?

Mr. Brett: No; we have it. Now, if the court

please, I direct your attention to Exhibit 4, the Interrogations. The document reads as follows:

“Judge Preston handed Mr. Brett, in the presence of Messrs. Oliver O. Clark and David D. Sallee, a document entitled ‘Statement of Facts’——

Mr. Preston: What page are you reading from?

Mr. Brett: End of 1.

“——in reference to the services performed by them, and each of them, in the case of Lee Arenas vs. United States.”

“Q. (By Mr. Brett): As I understand it, Mr. Sallee, the Statement of Facts, which has just been handed to me, consisting of eight pages and reciting certain facts respecting your activities are set forth in the Petition upon which the Order to Show Cause is based, may be deemed, for the purpose of the Stipulation, a statement of facts as you would testify to them in connection with what you did as attorney for Lee Arenas in this case? [3]

“A. Yes.”

As there stated, we are perfectly agreeable it go in; in other words, that it be deemed to be the equivalent of the testimony that would have been given by either Mr. Sallee or Mr. Oliver O. Clark, much of it being prior to Judge Preston’s entry in the case, if they were called to the stand and testified under oath.

I am trying to distinguish between stipulating facts themselves and stipulating to the fact that they would have so testified, to shorten the matter here.

The Court: This should be a supplement, then, to Exhibit 4, should it not?

Mr. Preston: That is what it really is.

The Court: It is incorporated by reference in the testimony of petitioners given in Exhibit 4.

Mr. Brett: That is correct.

The Court: Is there objection to receiving it for that purpose?

Mr. Brett: No, sir.

The Court: It will be received in evidence, then and be marked Exhibit 4-A here.

[Printer's Note: Petitioner's Exhibit 4A is set out at page 516, Exhibit 4B at page 526 of this printed record.]

Mr. Preston: You are discriminating against the person, is that correct? I made a statement myself. I want to know if you have any objection to it.

Mr. Brett: That was not intended, your Honor, except [4] that was a statement of services before Judge Preston went into the case. And I think it may be generally stipulated, then, that it is a part of Exhibit 4 and be received in the same manner.

The Court: As testimony on behalf of the petitioners, given by one or more or all of them.

Mr. Brett: That is correct.

The Court: Gentlemen, may it be understood now with respect to the attorneys appearing for the Government and Lee Arenas—I have heretofore stated that any objection made by one of you I

should take to be the objection of all—is it also understood that any want of any objection by any of you should be taken as an assent?

Mr. Brett: Unless otherwise expressed.

The Court: Yes. Unless one or more of you express some objection, it will be deemed that whatever is said is assented to.

Mr. Brett: On behalf of the Government that is stipulated to.

The Court: On behalf of the Government or Lee Arenas.

Mr. Preston: Will this Statement of Facts carry a supplemental number, your Honor?

The Court: It will be marked Exhibit 4-A in evidence, and that will tie it into Exhibit 4 of which it is a part and substance. [5]

(Volume I, page 53, line 20 to page 158, line 18):

JOSEPH A. GALLAGHER

called as a witness by petitioners, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Joseph A. Gallagher, G-a-l-l-a-g-h-e-r.

Direct Examination

By Mr. Clark:

Q. Where do you live, Mr. Gallagher?

A. 1337 Edgecliffe Drive, Los Angeles.

Q. How long have you resided continuously last past in this vicinity?

A. About 13 or 14 years.

(Testimony of Joseph A. Gallagher)

Q. In what vocation are you engaged?

A. I happen to be president of American Right of Way and Appraisal Contractors. That is an organization—I believe it is the only organization of its kind in the country. We specialize in the acquisition of rights of way and also in the appraisal of properties for rights of way purposes.

Q. How long have you been engaged in that connection?

A. I have been engaged in the right of way profession for approximately 23 years; in the appraisal profession about the same length of time. [6]

Q. And has that been your vocation throughout the entire period of your residence of 13 years in this vicinity?

A. Well, for a short period I had an office, a real estate office, on Crenshaw over near Olympic Boulevard, and engaged rather extensively in real estate operations in this city, and also in appraisal work and in the acquisition of rights of way.

Q. How large an organization in personnel is this organization of which you are president?

A. We have approximately 39 men active or on call at all times. In that 39 men we have quite a few surveyors, we have licensed engineers and licensed surveyors, and we are equipped to survey property as well as to acquire rights of way and appraise property.

Q. And in the conduct of the business of that organization is that personally under your immediate supervision and direction?

A. Yes, sir.

(Testimony of Joseph A. Gallagher)

Q. In the capacity of appraiser and as one engaged in the acquisition of rights of way, what organizations or governmental agencies have you or your organization represented during the past 10 or 15 years?

A. Well, in the early thirties I was district land agent for the Department of Water and Power.

Q. Of the City of Los Angeles? [7]

A. Of the City of Los Angeles. And in my capacity as district land agent I supervised the activities of the rights of way men, the field agents, and, in two particular instances of the appraisers. Those instances were in the acquisition of rights of way and appraisal of properties for the two Boulder Canyon transmission lines; also, when we brought additional water supply into Los Angeles from points north of Bishop, from LaVina. We had our headquarters at LaVina. I was then with the Department of Water and Power and added those particular classifications. I was engaged in the appraisal of property in the five towns in Owens Valley: Bishop, Lone Pine, Big Pine, Independence, and Laws.

I also appraised other large parcels of property for the Department, especially back in the mountains where the tank sites are; acreage at Sepulveda and San Fernando, near the San Fernando reservoir.

I rendered appraisals on houses on 98th Street, where the line comes in as it laps the city by way of 98th Street.

(Testimony of Joseph A. Gallagher)

I conducted a survey for the Department of Water and Power in industrial plants, an industrial survey in Southern California; likewise, a survey of business buildings for rental purposes.

While employed by the Department of Water and Power of the City in 1933 I was sent on a trip which took in approximately nine states. I believe that is the first time that [8] the Department had even sent a man out in the performance of a duty similar to this one. Starting in at Arizona, Nevada, Oklahoma, Missouri, Tennessee, Knoxville, Tennessee, Kentucky, Wheeling, West Virginia, that is as far east as I went, and then started back, Wisconsin, Illinois, Kansas, Colorado, Utah, and back to Los Angeles.

The following year the Department sent me to Victoria and Vancouver, British Columbia, on another special assignment.

I left the Department about the year 1939.

Q. In the practice of your profession have you also served the United States Government?

A. During World War II I was project manager for the U. S. Engineers, and in that capacity I served, I handled in the communication lines, that is, the acquisition for rights of way for communication lines along the coast as far as Mexico. The acquisition of rights of way for communication lines that took in roadway installations and gun emplacements. I worked close to the army, also worked close to the navy, worked very close to the Department of Justice. Besides handling the acquisitions of rights of way for communication lines, roadway installa-

(Testimony of Joseph A. Gallagher)

tions and gun emplacement I acquired property for airports, and mention Lomita flight strip. I was on the Metropolitan airport and a few others, and hospital sites. And the Bolsa Chica acreage, I handled that acquisition. I worked all through the war, possibly three years, [9] for the U. S. Engineers in the acquisitions of rights of way. I work close to the appraisers who were working under contract.

I refer particularly to the appraisal of property at Lomita, Lomita flight strip, and appraisal of property at San Pedro and Sepulveda's property at San Pedro. I refer to the roadway installations and communication properties in San Diego County, also those properties at Bolsa Chica near Huntington Beach.

Q. In the practice of your profession have you served the State of California?

A. Yes. I happen to be special examiner for the State Personnel Board for the State of California.

Q. Will you state what that duty consists of?

A. That is examining applicants for civil service positions, the division of highways. These civil service positions pertain to real estate classifications, appraisers and rights of way men; that is, I have examined for several years for the State, examining here in Los Angeles and San Francisco and in Sacramento. As a matter of fact I received a letter just possibly a month ago from the State Personnel Board in which the State Personnel Board tells me or told me that they consider me to be a part of their organization for examining purposes.

(Testimony of Joseph A. Gallagher)

Q. Have you served the California Division of Highways [10] in making any appraisals of properties involved in its activities?

A. In an indirect way; yes. I have appraised property in Pasadena. We appraised that property last month for the widening of Foothill Boulevard. The City of Pasadena and the State of California are naturally interested in the widening of these different arterials for freeway and highway purposes.

I appraised Foothill Boulevard from Santa Anita Avenue to Sierra Madre Villa Avenue for the City of Pasadena.

I have appraised other properties for highway purposes, representing property owners in these particular instances. One is from the City of Pismo Beach to close to San Luis Obispo, representing the Carpenter estate.

I also represented property owners in the Hollywood Freeway at Sunset Boulevard and Figueroa, represented property owners in the widening of portions of Vernon Avenue. I represented property owners whose property was affected by a sanitation sewer line in Montebello. I represented several of the small communities in and around Los Angeles in special appraisal work and acquisitions of rights of way.

At the present time I am representing Ventura County. We have already appraised Ventura River levee. The United States engineers are naturally interested in construction work and their contractor is

(Testimony of Joseph A. Gallagher)

ready to go down there and start [11] clearance at the present time. That appraisal is a completed appraisal.

I represented Ventura County in the acquisition of two dam sites, Matilija Dam and the Casitas Dam. The property for the Matilija Dam has already been acquired. Casitas Dam property is at an estoppel at the present time until a few engineering complications have been taken care of.

I have an office with the County Engineer in Ventura County.

Q. In your experience in the capacities to which you have testified have you done any work for the Southern California Gas Company and the Southern Counties Gas Company?

A. I entered into a contract with the Southern California Gas Company and Southern Counties Gas Company to appraise the property for the biggest inch gas line from Texas and New Mexico. That was a 30-inch line. My work started at the Colorado River east of Blythe, and I appraised the property from the Colorado River east of Blythe to Santa Fe Springs. All of the property affected by that biggest inch gas line was covered from Texas and New Mexico to Los Angeles. That took in quite a large acreage.

Q. Have you represented the Standard Oil Company and other major oil companies in the appraisal of properties?

A. I have served as a special representative of Standard Oil. I was with Standard Oil on the Stan-

(Testimony of Joseph A. Gallagher)

pac deal during the war. We were trying to push oil across the Pacific [12] when the boys needed oil there. And that was a 175-mile deal from Bakersfield to San Francisco. I was on that deal for almost a year.

Completing that, Standard brought me down here to acquire rights of way and do appraisal work on another line running through Compton, Huntington Beach and South Gate. I represented Standard Oil in several instances.

Q. In the description you have stated your activities in that profession have you included any service which you have rendered, if such there were, to the Department of Finance of the State of California?

A. I have likewise appraised for the Department of Finance of the State of California. One of the properties was located at Brea, and the reason for that appraisal was for the expansion of Pacific Colony. That took in, I believe, 200 some odd acres. I forget now just what the acreage was.

I have likewise appraised property at San Gabriel for the Department of Finance of the State of California.

Q. Have you made any appraisals for any school districts?

A. I have represented the Arcadia school district; I represented Protero High School District; I represented the Santa Pula School District in the appraisal of property.

Q. Have you also appraised properties in down-

(Testimony of Joseph A. Gallagher)

town Los Angeles, business properties? [13]

A. I have appraised some downtown business properties. I refer particularly to the northeast corner of Los Angeles, Los Angeles and Aliso Street, that large corner there. I appraised that property, representing Guthrie, Darling and Shattuck, attorneys. I at the present time am about ready to enter into an appraisal of another piece of property on Broadway which possibly will be a matter of hearing in—I don't know just when.

Q. Are you a college graduate?

A. Yes, sir.

Q. Of what university? A. Notre Dame.

Q. In what year? A. 1909.

Q. In the experiences you have had in appraisal work have you had occasion to appraise properties throughout the Palm Springs area prior to your appraisal of properties for the purpose of this immediate hearing?

A. Yes, sir I have, in the acquisition of rights of way. For this biggest inch gas line we naturally took in in our appraisal work an area, not just exactly contiguous to the line itself, but we took in an area, oh, possibly two or three miles and even farther than that on each side of the line, made a comprehensive survey of the area around the All American Canal on that occasion. [14]

I spent a lot of time at Palm Springs. As a matter of fact, I have appraised property at Palm Springs for Bob Hope. I have represented his wife in the acquisition of property at Palm Springs. Mr. Hope

(Testimony of Joseph A. Gallagher)

has asked me to do some other special work for him in the area of Palm Springs. That work I have done and which work I did not complete. I have actually spent quite a bit of time there at Palm Springs.

Q. And when was it that you did this work in Palm Springs area in connection with your appraisal of the right of way for the gas line?

A. In '45 and '46.

Q. Have you made any special investigation and study of the valuation and adaptability to use of properties in the Palm Springs area under employment by petitioners in this case? A. I have.

Q. Did you engage the services of the personnel of your organization in making that investigation and study? A. I did.

Q. And did you, at the request of the petitioners in this case, prepare in written form, supplemented by maps, photographs, and other data, a report as of date December 9, 1947? A. I did.

Q. And was the work which was done in connection with [15] that service on behalf of the petitioners in this case all done either by yourself personally or under your immediate supervision by the personnel of your office?

A. It was done by me personally and also by the personnel of my office.

Q. Acting under your immediate supervision?

A. Acting under my immediate supervision.

Q. And where any service of that sort was rendered by the personnel of your organization did you personally take the occasion to verify to your satis-

(Testimony of Joseph A. Gallagher)

faction the accuracy of that which was reported to you? A. I did.

Q. And have you embodied within the report to which I have referred the data which was obtained, as you have said, in the course of that study?

A. I have.

Q. In connection with that study and in preparing yourself to form and express an opinion, first, as to the highest and most valuable use to which the properties involved in this proceeding were adapted, and secondly, as to the reasonable market value of those properties, how many other properties did you take into consideration?

A. Typical and comparable properties, I believe we had between 100 and 120 that we took into consideration. The report shows 60 some odd—66, I believe, but over a hundred [16] we took into consideration.

Q. And what investigation, particularly, without going into the matter in too much detail, did you make with reference to the adaptability to use of the properties immediately involved here and the comparability of the other properties to which you have referred as to which you gave consideration?

A. I believe we made a rather thorough investigation of that. When we first went to Palm Springs to start this assignment of work, we drove around Section 14 and Section 26. We wanted to get a good picture of those two sections in reference to adjacent sections on the north, south, east, and west of 14 and 26. After driving around Section 14 and Sec-

(Testimony of Joseph A. Gallagher)

tion 26, we started at the northwest corner of Section 11, which is north of Section 14.

We drove down Indian Avenue to where Indian Avenue joins with Palm Canyon Drive and continues on to Indio. We drove that distance in order to ascertain the type of developments, the real estate activities in and around Palm Springs and in and around the general area east of Palm Springs. We likewise drove Palm Canyon Drive from the northerly boundary line of Section 11 to the junction point with Indian Avenue in order to establish in our minds a picture of the type of development along Palm Canyon Drive. That is where the civic center of Palm Springs is, there in Section 15 next to Section 14. [17]

We then drove north on Ramon, on Ramon Avenue, by the high school. Ramon Avenue is the street to the northerly boundary line of Section 26. It is the southerly—well, we drove Ramon Avenue, the boundary line of Section 04, Ramon Avenue by the high school, by the airport, to Thousans Palms—that is right up the highway, right near Alonzo Bell's property—trying to ascertain the particular type of development and real estate activities in that area north and south. We made a comprehensive study of the developments around Garnet, a very comprehensive study of those developments.

After doing that and establishing this picture and view, and inspecting several of those new subdivisions which are now where structures have been built, we called at the offices of the Palm Springs

(Testimony of Joseph A. Gallagher)

Water Company for information regarding water rates; we called at the offices of the California Light and Power Company for information; we stopped at the offices of the Southern Counties Gas Company for information. We went to the office of The Desert Sun, the local newspaper, trying to ascertain facts that would be of assistance to us in arriving at an estimate of value.

We talked to members in the office of the Chamber of Commerce; we went to the City Hall; we talked to the City Engineer and secured quite a bit of information from the City Engineer. We went to Riverside and we talked to a member of the force of the County Engineer, the County Assessor's [18] office, the Tax Collector's office. We secured considerable information from those sources.

We went to the offices of the Farm Bureau in order to satisfy our minds in regard to topographical conditions, soil conditions, and other factors that might help us in arriving at an opinion of value.

We secured from one of the blueprinting offices a map showing the entire area around Sections 14 and 26.

We interviewed Jack Gray, an aerial photographer. We had him take aerial photographs of the area around Section 14 and Section 26.

We interviewed property owners in Palm Springs. We talked to brokers in Palm Springs; we talked to brokers in Cathedral City and in Indio. Charley Boyle, over at Thousand Springs, Charley Boyle who put Deep Well Ranch on and Smoke

(Testimony of Joseph A. Gallagher)

Tree Ranch, and now has Hidden Springs Ranch north of the highway at Thousand Springs, that is north of Alonzo Bell's property. We talked to brokers at Banning and Beaumont.

We surveyed maps from Riverside County showing all the sections, townships, and ranges in Riverside County, in order to be able to get as close a picture as possible of the general area around our subject property.

We secured what is called by the City of Palm Springs "land measure use map" showing the zoning of properties in [19] Palm Springs. We called at the United States Land Office and secured some maps showing Section 14 and Section 16 and other sections surrounding those two sections.

We also secured from the newspaper office a city map showing the location of the streets in Palm Springs and locations of major buildings, major structures, civic buildings and the like in Palm Springs. We secured a great many listings and information regarding a great many sales of properties in the sections north, south, east and west of Section 14, and the sections north, east and west of Section 26.

What was one of the stronger purposes of this work was this: We took Section 14 and surrounded it with the existing Sections 11 on the north, 13 on the east, 14 on the west, and 23 on the south.

Mr. Preston: You mean 15? You meant 15?

The Witness: No; 23 on the south.

Mr. Preston: You said "14".

(Testimony of Joseph A. Gallagher)

The Witness: 13, 15—thank you. 13 on the east, 15 on the west, and 23 on the south. We averaged the listing prices and the sales prices of properties in those four sections, trying to strike an average of value in Section 14. We went into a comparison of those four sections.

We did the same thing with the sections around 26, that is, Section 25 on the east, 27, and then Section 23 on [20] the north. We went farther out east where several of those subdivisions, new subdivisions, had been established. That would be somewhat north and east, and then a couple of subdivisions directly east.

We had several talks with some of the VA, Veterans Administration appraisers who have appraised that property. I happened to be a Veterans Administration appraiser myself. I have served on a great many panels. We had some talks with some of the men who appraise property, and that is where these subdivisions are, and we secured information which we have used in our report.

Q. By Mr. Clark: I believe you stated that you did interview realtors, local realtors in the Palm Springs area, in reference to the listings and sales of properties there? A. I did.

Mr. Clark: Your Honor, may I inquire of counsel if it would be permissible to counsel, and to the court, at this time to make use of a large map which the Government has had prepared which shows the location of these properties?

The Court: This report you have, Mr. Clark,

(Testimony of Joseph A. Gallagher)

doesn't that summarize the witness' testimony?

Mr. Clark: Yes; it does, your Honor.

The Court: Could it not be stipulated that he will be deemed to have testified on direct as stated in his report, and let the report come in and then conduct such a cross examination as the other side may desire? [21]

Mr. Clark: Your Honor, I appreciate that suggestion very much and I was going to inquire of your Honor about your practice, after I had concluded the qualification, and I have concluded it. Next, I wanted to get a map on the board, and then I was going to ask your Honor if that would be permissible, because we have furnished, as I said yesterday, to counsel for examination a copy of the report and the one they may have to keep for use here will be a complete copy of it.

The Court: Is the map attached to the report?

Mr. Clark: Yes, your Honor; there is a map attached to it, and we have two others that we wanted to put on the board, in large detail, showing the location of the properties which the witness considered as comparable and took into consideration in forming opinions in this case. I think your Honor's suggestion is a very, very good one and it saves a lot of time.

Mr. Brett: If the court please, in connection, first, with Mr. Clark's statement, we have prepared a map and intend to offer it. I would like, however, to have it marked as our exhibit.

Mr. Clark: Yes.

(Testimony of Joseph A. Gallagher)

Mr. Brett: Since we are preparing it. I have no objection to offering it at this time as the Government's first exhibit, and then having Mr. Clark use it. [22]

And as to the second matter, while normally we object to offering the writings that are prepared by experts, because they contain very frequently much that is not conclusions as to value but other statements that would be improper, this being a court trial, we have no objection if—I am not going to be caught with this position: In other words, I understand as a matter of law, if we insist upon the objection, it would be sound. I think I could cite the authorities. But we have also prepared and submitted the reports of our experts, and if it be understood that we are going to have that uniform——

Mr. Clark: Oh, yes.

Mr. Brett: In other words, at my opportunity, I can offer the same type of material, I have no objection.

Mr. Clark: Absolutely, your Honor.

The Court: I understand it is so stipulated.

Mr. Preston: Yes, sir.

Mr. Brett: May the clerk mark our map that Mr. Clark has there as the Government's first exhibit?

The Clerk: Respondents' Exhibit A.

The Court: Is there objection to receiving that into evidence?

Mr. Clark: No; we have not, your Honor.

The Court: Do you offer it, Mr. Brett?

(Testimony of Joseph A. Gallagher)

Mr. Brett: Yes; I do, your Honor.

The Clerk: It will be Respondents' Exhibit A into evidence. [23]

Mr. Clark: We offer, if your Honor please, as Petitioners' next exhibit the report of this witness to which reference has been made, and hand it to the clerk for marking.

The Court: Is there objection?

Mr. Brett: There is no objection, your Honor.

The Clerk: 14.

Mr. Brett: Based upon the stipulation that we have entered into that we reserve the same right at our time.

The Court: Very well.

Mr. Clark: I will hand to counsel——

The Court: Then this report, gentlemen, pursuant to stipulation, will be deemed a part of the witness' direct testimony.

Mr. Brett: That is correct, your Honor.

Mr. Taheny: May I inquire, is that Exhibit 14?

The Clerk: Yes, sir.

The Court: In evidence.

Mr. Clark: May the record show that my associate is now putting together a copy of that report which I am handing to counsel for the Government for their own personal use? They may keep it. It is a complete copy of the one now in evidence. I thought it would facilitate their work.

We offer into evidence, your Honor, after first showing the same to counsel for Lee Arenas, a map

(Testimony of Joseph A. Gallagher)
prepared by this [24] witness in illustration of his testimony.

Mr. Brett: Well, I will object to this offer. I have no objection to it being marked for identification but it contains a great many writings and I do not feel there is any foundation laid for their offer in evidence at this time.

Mr. Clark: May I say there is nothing shown upon this map that is not contained within the report in evidence.

Q. Is that true, Mr. Gallagher?

A. That is right.

Mr. Brett: Upon that statement, of course, I could have no objection. I withdraw my objection.

The Court: It is received pursuant to the same stipulation as Exhibit 14.

Mr. Brett: Yes; as a part of that exhibit. Then I would say, if your Honor please, it is merely an exemplar of that.

The Court: Yes; it is, in truth, a part of the exhibit, is it not?

Mr. Clark: May it be 14-A, then, your Honor, to supplement the exhibit?

The Court: Yes; it will be 14-A in evidence.

The Clerk: The map is so marked.

Q. (By Mr. Clark): Mr. Gallagher, would you take the pointer and step to the board and, by reference to the map, Petitioners' No. 14-A, indicate the properties involved [25] in this immediate hearing, that is, first, the property in Section 14.

A. Section 14.

(Testimony of Joseph A. Gallagher)

Mr. Brett: Your Honor, would you permit me to sit over on this side?

The Court: Yes.

Mr. Clark: Counsel may take my chair. I am not using it. Instead of "14-A" it is 14.

Mr. Preston: That is the Government's map.

Mr. Clark: Oh, yes. I beg pardon. That is right. Thank you very much. That is Exhibit, then——

The Clerk: Respondents' A.

Mr. Clark: A of Respondents'. Thank you very much.

Q. All right, now, if you will do that, Mr. Gallagher.

A. Section 14 I am pointing to with the ruler contains four acres which were the subject matter of our report. Those four acres are divided into two parcels, a two-acre parcel designated as Lot 46 and a two-acre parcel designated as Lot 47.

In Section 26 we have Lot 39, five acres; Lot 40, five acres. In my report I have designated this one as Lot 50, 10 acres; 51, 10 acres; 52, 20 acres; and 53, 40 acres. This latter acreage is located in Section 26 which is one mile south of Section 14.

Q. And about the property on that map is indicated [26] other property, a part of which is in subdivision, is that correct, in accordance with the observations and studies which you have made?

A. That is correct.

Q. May I inquire——

Mr. Brett: I did not quite understand the question. What is that reference to?

(Testimony of Joseph A. Gallagher)

Mr. Clark: Around Section 14 are properties as shown upon this exhibit that are in subdivision, as shown on the exhibit.

Mr. Brett: Outside of——

Mr. Clark: Outside of Section 14.

Your Honor, may I inquire of counsel if he is willing to stipulate that a portion of the property within Section 14, which includes the subject property, has been subdivided, and that I am handing to counsel a photostatic copy of the subdivision plat?

Mr. Brett: No; I am not so willing to stipulate.

Mr. Clark: May I ask counsel, your Honor, this: If he is not informed that the subdivision was made and the plat prepared by Mr. Wadsworth, the allotting agent involved in the proceeding here? That is the fact.

Mr. Brett: I am not so informed. I cannot so stipulate. Your Honor, if counsel means this: Did Mr. Wadsworth, as special allotting agent, prepare some drawing and map, note [27] arbitrary numbers and designate portions of areas within the various sections, I will so stipulate. But the question was: Was there any subdivision, which would mean was there something which was approved by the Secretary of Interior as a subdivision, with the necessary features that go with a subdivision. That I can't stipulate.

Mr. Clark: My information, may it please the court, is that it was approved by the Secretary of Interior.

(Testimony of Joseph A. Gallagher)

The Court: Is what you desire a stipulation as to a map?

Mr. Clark: Yes, your Honor.

The Court: Perhaps if you left off the descriptive language, Mr. Brett would stipulate that what you have is a copy of the map prepared by Mr. Wadsworth.

Mr. Clark: Thank you, your Honor. And I have shown counsel the map for Section 14 which covers the subject property in that section.

Mr. Brett: May I inquire of counsel? Is it your request that I stipulate that this is a drawing that was prepared by Mr. Wadsworth?

Mr. Clark: That is true, the allotting agent, in the course of his allotments under the direction of the Secretary of Interior.

Mr. Brett: If the court please, I am not in a position to do it because I do not know it. I mean I have no way of stipulating. [28]

The Court: Wasn't there such a drawing in evidence——

Mr. Brett: If there was, I did not know it.

The Court ——perhaps in this case or in the other Indian case?

Mr. Brett: There was a map that we brought up in the Belardo case but I was unable to establish it. I think your Honor will remember we were endeavoring to get some determination that there was a street there that people were squatting in and I was not able to establish it. I found out that I was up against a proposition that I could not show ap-

(Testimony of Joseph A. Gallagher)

proval. But that was not this, and I do not want to be captious, but as Government counsel, also representing the Indian, I do not feel that I should stipulate to something of which I have no knowledge.

Now, I do know, and I will so state, that Mr. Wadsworth, Mr. H. E. Wadsworth, was a special allotting agent who was designated by the Secretary of Interior; that he did come down into this area and did make selections for allotments; and that in connection with that he did prepare something to indicate where those selections were. But whether this is the instrument or not, I do not know and I do not know of any provision having been made wherein the Secretary of Interior, to this date, has established any streets any place or any lots by designation officially.

The Court: As to these allotments which were made to [29] Arenas is there a map in the evidence in the case in the main trial?

Mr. Brett: Judge Preston will have to answer that. I do not remember seeing any.

Mr. Preston: I was trying to recall, and I think there is evidence in the record that Mr. Wadsworth took the Government surveyors from Los Angeles down there and surveyed this area and platted it, and there was a description made of each Indian's allotment and it was designated as numbered in this record here, now on this map here, and whether there was an actual map or not, I do not at this moment recall.

(Testimony of Joseph A. Gallagher)

The Court: Isn't it your ultimate purpose to stipulate or to show what land was in fact allotted under the 1927 allotment to Lee Arenas?

Mr. Brett: As to that, your Honor, I understood there is no dispute between us. We prepared the map, and I will stipulate that the two areas which are shown on Government's Exhibit A as 46 and 47 are the so-called townsite areas in Section 14 which were the subject matter of this particular action, **and which have now been held to belong to Lee Arenas to the extent of his having established the fact that he is entitled to a trust patent; and I will also stipulate that the areas which are designated on Government's Exhibit A by the numbers 39 and 40 and which are in Section 26 are the five-acre parcels which are the subject of this action, [30]** that is, I mean the original action of which this is a part, and which are adjudicated as those to which Lee Arenas was entitled to a trust patent; and I will also stipulate that the larger cross-hatched areas which Mr. Gallagher recently referred to as being designated by the numbers 51 to 54, inclusive, and which constitute two 10-acre parcels, one 20-acre parcel, and one 40-acre parcel, all of which are contiguous, are likewise areas which were selected for or by Mr. Arenas and in this judgment in this case were established as being those to which he is entitled to a trust patent. I will so stipulate.

The Court: All of the town lots shown on Exhibit A in Section 14 and the acreage in Section 26, is that it?

(Testimony of Joseph A. Gallagher)

Mr. Brett: That is correct, your Honor.

The Court: Do you accept the stipulation?

Mr. Clark: We accept the stipulation, your Honor. It does not go quite as far as we desire to go, because we desire to show——

The Court: Suppose you offer a further stipulation.

Mr. Clark: Yes, your Honor. I hand counsel a photostatic copy of that which I say is the allotment schedule of 1923, prepared by Mr. Wadsworth as the allotting agent of the Secretary of Interior. I think that this probably is in evidence in the trial of this case before Judge O'Connor, at least a photostatic copy of it, and it makes reference to [31] the lots by number in accordance to the subdivision to which we have referred within Section 14, and includes many lots in addition to those allotted to the Arenas family and adjacent. And we would like to show that this property is not simply an unsubdivided area for any purpose, but in connection with the allotments to the members of that Indian band were subdivided and then given a number in the allotment schedule.

Mr. Preston: Don't you want to refer to this, page 279 of Exhibit 11-A, which is the transcript of the proceedings, and at the trial called the second trial there is a description of the allotments with numbers and everything on it?

Mr. Clark: That is right.

Mr. Preston: That is the testimony of Mr. Wadsworth.

(Testimony of Joseph A. Gallagher)

The Court: Before you submit that to Mr. Brett, perhaps what Mr. Clark has is a photostatic copy of the same document.

Mr. Clark: Then, may I say to counsel, your Honor, that the maps to which I refer are the maps which show the location on the ground of the parcels given numbers in the allotment schedule. Counsel by comparing the same will see that that is true. So I think we ought to have the map in connection with the allotment schedule as applied to the members who are not on the larger map.

Mr. Brett: I think up to this point, at least, I have not been asked to enter into a stipulation. May I just [32] explain this? I do not want to be captious and I do not want to keep anything out of the record that is properly there. We have, as I said, stipulated to these particular designated parcels.

I think this court is both entitled to and would be required to take judicial notice of the records of the court and all decisions that have been made in reference thereto. From that fact I am sure that the court will take judicial notice of the fact that, although originally there were a number of selections actually brought from there, by final decision of the Supreme Court, affirming the Circuit Court, in the one instance, all of the 23 selections have been declared to be void, and therefore as to them they no longer exist. They would not be relevant here.

As to the 27 selections, all except the Arenas one have been held to be void, with one single exception, because in the companion Hatchitt case, which also

(Testimony of Joseph A. Gallagher)

went to the Circuit Court and as to which there was no petition for certiorari made, so that it became final, the Circuit Court again affirmed the Saint Marie judgments held that as to all the other parties in the Saint Marie cases, which are these listed parties, that that judgment was *res judicata*, and therefore necessarily held that those allotments or selections were no longer void.

So that while it is a fact, if the court please, that [33] Mr. Wadsworth made a number of selections, and it is a fact that in the Arenas case there were certain exhibits which listed the various individuals and listed the number of the selections, it is likewise a legal fact that as of this time, which is our date of valuation, the only member of the tribe who has established any right to an allotment is Lee Arenas and these other selections are null and void.

The Court: But, in the state of our record here, haven't we in evidence in this proceeding all the testimony of Wadsworth and all the other witnesses who testified upon the trial?

Mr. Brett: That is correct; yes, sir.

The Court: As well as all the exhibits?

Mr. Brett: That is right. And, of course, I am not attempting at all to preclude that. That went into evidence yesterday. But I understand counsel want me to stipulate to a map. If there was a map in evidence, I am willing to stipulate to it.

I am not being captious. I do not know, your Honor. My own examination of the record, so far as my recollection is concerned, is that there was no

(Testimony of Joseph A. Gallagher)

such map offered, but I may be in error on that.

The Court: Your view is that if it is in the record, the court may take judicial notice of it, of course, but otherwise you are unable to stipulate?

Mr. Brett: I can't stipulate because I know of no such record.

Mr. Clark: All I care, your Honor, is to have the map before the court so it orients and applies to the account of the testimony and affidavits that are already before the court, that is all.

The Court: Are those maps in evidence in any of these proceedings that have been offered?

Mr. Clark: I am unable to say, your Honor. My recollection is——

The Court: Then we are unable to go further with respect to that because Mr. Brett cannot stipulate.

Mr. Preston: That is a map here but I do not think it covers all the area.

The Court: Can't we proceed now?

Mr. Clark: Oh, yes, your Honor, we can. May I have these marked for identification because, perhaps after counsel has compared them and examined them, he would be willing to stipulate, if I may mark them for identification? First, the map as to Section 14.

The Court: The map of Section 14 is what, Exhibit 15 for identification, Mr. Clerk?

The Clerk: Exhibit 15 for identification, your Honor.

(Testimony of Joseph A. Gallagher)

[Printer's Note: Exhibit 15 is set out at page 549 of this printed record.]

The Court: Is there another one, now?

Mr. Clark: Yes, your Honor; the map of Section 26. [35]

The Court: That will be Exhibit 16 for identification.

[Printer's Note: Exhibit 16 is set out at page 550 of this printed record.]

Mr. Preston: There is a fairly accurate map, I assume it might serve some purpose, at 421. It is a map of this Reservation which has the Arenas land marked on it.

The Court: You are referring to a map where?

Mr. Preston: A map in Exhibit 11-B, and the same map is in Exhibit 11-A, which is practically the same thing that we have here.

The Court: Very well. Does this complete the direct examination?

Mr. Clark: No; not quite, your Honor, not quite.

Q. Directing your attention, Mr. Gallagher, to the second map, which is 14-A for Petitioners, I ask you what the colored line running diagonally across the map represents? And would you step to this side so as not to obscure the view of counsel and the court?

A. The colored line represents the wind belt that comes in from the northwest and extends in a southeasterly direction through the Palm Springs area. Property on the west of this red line or the wind

(Testimony of Joseph A. Gallagher)

belt line is out of the wind belt; in other words, no wind storms, sand storms affecting in any drastic way these locations. Property on the east of the red line or the wind belt line are in the wind belt section and are affected by sand storms and by heavy winds. [36]

The reason for that is this: The San Jacinto Mountains come in a direction—I will have to try and describe it as I am talking—the San Jacinto Mountains start in a northerly direction and come along somewhat like this, running east. The Little San Bernardino Mountains are in this area.

Mr. Preston: “This” don’t mean much, Mr. Witness.

A. Those San Bernardino Mountains are north of Section 2 which is one mile north of Section 14. The San Gorgonio Pass is located between the San Jacinto Mountains and the Little San Bernardino Mountains.

The Court: Do the San Jacinto Mountains run to the west and south of the area shown on the map?

The Witness: That is right.

A. And the wind coming down from Beaumont and Banning through San Gorgonio Pass will hit into the mountains, and at about this location there is an elbow in the mountains——

Mr. Clark: Indicating the northeast?

A. The northeast; there is an elbow. That elbow breaks up those heavy winds and disperses them some way, which cause the winds to be deflected east of this red line, which causes the property west of

(Testimony of Joseph A. Gallagher)

the red line to be out of the wind belt section.

That information we have received through a study and also received from officials at Palm Springs and also certain officials in Riverside. [37]

Mr. Clark: Now you may resume the stand. I show to counsel an aerial map or photograph, and is this the aerial photograph to which you testified?

A. It is.

Q. To the best of your knowledge, based upon the studies and observations that you have made, is it a correct aerial representation of the territory shown within it?

A. It is.

Mr. Clark: We offer this in evidence as the Petitioners' next exhibit.

The Clerk: 17.

The Court: Received in evidence.

Mr. Clark: Counsel may cross examine, your Honor.

The Court: We will take the morning recess at this time.

Mr. Preston: Thank you, Judge.

The Court: A five-minute recess.

(Short recess.)

The Court: You may proceed with the cross examination.

Cross Examination

By Mr. Brett:

Q. In your direct examination, Mr. Gallagher, you stated that you had been in Los Angeles for 13 years as an appraiser?

(Testimony of Joseph A. Gallagher)

A. I understood the question to be: How long have [38] you lived at 1337 Edgecliffe Drive.

Q. This organization, American Right of Way and Appraisal Contractors, is a private name that you just adopted after you left the Government service, isn't it? A. That is right.

Q. And that has been continuing about how long?

A. About two to two and one-half years.

Q. I believe, Mr. Gallagher, that so far as his Honor is concerned and the counsel who are here, that we are probably informed as to these various areas that you have referred to in stating the scope of your work, but, for the record, in order that others might have some information of it in connection with your Department of Water and Power work, which you said was in the early thirties, was there any part of that work that was in the immediate area of Palm Springs?

A. No, sir. There was considerable work across the desert in comparable and typical desert lands in Nevada, coming in from Boulder Dam to Los Angeles, as we approached Los Angeles from Boulder City.

Q. Just as a matter of calculation, approximately how far from the location of Palm Springs was this work that you conducted in connection with the Boulder Canyon power line, that is, what was the nearest point in that work that came to the circumference of the area which we describe as Palm Springs? [39]

(Testimony of Joseph A. Gallagher)

A. Well, I should say San Bernardino. We hit in west of San Bernardino with the Boulder Canyon transmission line. San Bernardino, I believe, is about 39 miles from Palm Springs, approximately.

Q. And they are separated by a range of mountains? A. Right.

Q. Your answer is "yes"? A. Yes, sir.

Q. You referred to LaVina. LaVina is up in Mono County? A. Yes, sir.

Q. Up in the mountains to the east and north of Los Angeles some 300-odd miles?

A. Yes, sir.

Q. And would, therefore, be approximately 400 or 410 miles minimum air line from Palm Springs, wouldn't it? A. Yes, sir.

Q. Now, you stated that you were a right of way field agent and that you were a project manager for the United States Engineers' office at Los Angeles during World War II?

A. I do not believe I stated I was a right of way agent. I stated I was a project manager for the U. S. Engineers' office.

Q. In that work you were a negotiator and supervisor of others who made negotiations, is that not correct? [40] A. Yes, sir.

Q. Such appraisals as were made were made by other persons, either personnel who were employed as appraisers by the War Department directly as salaried appraisers or by individuals who were hired in each separate instance and whom, to iden-

(Testimony of Joseph A. Gallagher)

tify them from the others, we will call independent appraisers, is that correct?

A. In a great many instances, yes; in some instances, no. The office asked me to run an appraisal on Lomita flight strip after one of the office appraisers had made an appraisal. That I did.

Q. Now, let us stop there just a minute. Lomita flight strip is down in the southwest area of the Los Angeles metropolitan district?

A. Yes, sir.

Q. And approximately how far is it air line from Palm Springs?

A. Palm Springs is approximately 109 miles from Los Angeles. Lomita, I would say, is about 19 miles; it would be about 128 miles.

Q. You referred also to the Metropolitan airport. Where is that Metropolitan airport located?

A. In Van Nuys, California.

Q. That, then, would be even a longer distance from Palm Springs than Lomita flight strip, is that correct? [41]

A. Van Nuys is 109 miles—Los Angeles to Palm Springs—and Van Nuys, I should say, about 14 miles to the location of the Metropolitan air strip, which would be 123 miles.

Q. Then you also referred to Bolsa Chica acquisition by the United States for the Navy Department?

A. If I said "Navy" I was in error. It was for the U. S. Army.

Q. And that was an area that is below Hunting-

(Testimony of Joseph A. Gallagher)

ton Beach in the area that was formerly used by the Bolsa Chica Gun Club?

A. Yes, sir.

Q. That is separated by a range of mountains from the Palm Springs area? A. Yes, sir.

Q. And would be approximately how far from Palm Springs?

A. Approximately 130 miles.

Q. That particular area included actual beach frontage right down on the Pacific Coast Highway, and also areas that were immediately adjacent but on a bluff immediately above the Pacific Coast Highway, is that not correct? A. Yes, sir.

Q. How long were you with the War Department?

A. I believe about three and one-half years. [42]

Q. And how many appraisals in all did you make during that period?

A. May I enumerate some of those appraisals?

Q. Well, can you give us the approximate number without enumeration?

A. There were a great many locations where there were single family residences, and then there were locations where acreage was involved. Even the adobe house, that old adobe house at San Diego I ran an appraisal with two of the employed appraisers by the U. S. Engineers on that. I should say, oh, a dozen to 15.

Q. Now, summarizing those, Mr. Gallagher, what would you say was the nearest in point of air line miles to the area of Palm Springs?

(Testimony of Joseph A. Gallagher)

A. Of the appraisals we have just talked about, made for the U. S. Engineers, made for the United States Government?

Q. Yes, sir.

A. Between 110 and 120 miles I should say.

Q. You testified to having made some appraisals in connection with the proposed widening of Foot-hill Boulevard; that was in the immediate environs of the City of Pasadena? A. Yes, sir.

Q. And that, too, would be at least 90 miles away from Palm Springs? [43]

A. I should say approximately 90 miles.

Q. Then you referred to certain appraisals made for property owners of Pismo Beach at San Luis Obispo, and that is approximately 250 miles from Los Angeles, isn't it? A. Yes, sir.

Q. You also referred to making some appraisals for the Hollywood Freeway at Sunset and Figueroa and at Vernon Avenue. I presume that is not for the Hollywood Freeway, but my notes indicate some of Vernon Avenue.

A. City, city widening.

Q. Those are appraisals of projects in the metropolitan area, the City of Los Angeles?

A. Yes, sir.

Q. Now, you mentioned that you made or had something to do with a sanitary or sanitation sewer line in Montebello. Was that an appraisal?

A. I represented the property owners whose property was affected by the sewer line going through Montebello. These property owners were on

(Testimony of Joseph A. Gallagher)

Telegraph Road just east of proposed Slauson Avenue.

Q. And approximately how far is that in air line miles from Palm Springs?

A. I should say about a hundred miles.

Q. Now, you mentioned two dam site appraisals of the Matilija and Casitas, I believe you said,— is that right, [44] the Casitas? A. Yes, sir.

Q. Those were what county?

A. Ventura County.

Q. In air line miles how far would they be from Palm Springs? A. About 173 to 175 miles.

Q. Those are up in broken areas in the mountains?

A. Yes, sir. However, there is a considerable level land besides the mountain land in those dam sites.

Q. Now, you next testified about having done some work in connection with the big inch gas line for two of the local gas companies, starting at the Colorado River east of Blythe and proceeding to Santa Fe Springs. That was a right of way acquisition?

A. Right of way and buying acquisition both. Primarily for rights of way.

Q. And approximately what width?

A. 20 feet.

Q. In considering that entire line what was the nearest point of that line to the community known as Palm Springs?

A. We hit in south of the highway at White-

(Testimony of Joseph A. Gallagher)

water. I should say Whitewater would be about four to five miles north of Palm Springs. We hit on both sides of the [45] highway at Garnet. Indian Avenue through Palm Springs comes out at the highway at Garnet. I should say about five miles.

Q. Do you recall what value you fixed on acreage in that area?

A. Yes; I believe I have an idea as to what the value was around Whitewater. That is where we had the wash. Land values were not too high there at the wash of Whitewater because they had quite a few flash floods and there were a great many engineering complications that the gas companies were confronted with in the construction of the line in that particular location. I believe they had to call in some of the engineers from Caltech to assist them or to advise with them. I might be wrong on that. The engineers from Caltech—I think I am right. But they called for advice for engineering to help them over new engineering problems at Whitewater.

At Garnet we did not run into many problems, except the wind. There was a considerable wind problem around Garnet, considerable wind problem between Garnet and Charley Boyle's property over at Thousand Palms, just north of Alonzo Bell's property. I have been there where you could hardly see in front of you for a distance of 50 feet during the sand storms.

Q. Now, may I just summarize my view of what you have [46] just said and then you tell me

(Testimony of Joseph A. Gallagher)

whether it is correct or not: That after the matters that you have just described coming to your attention—and I notice you deem those particular localities in no wise comparable to these properties that are here under consideration? A. Yes, sir.

Q. Is that a correct statement?

A. Yes sir.

Q. So that particular work and investigation, then was not helpful to you in arriving at an opinion of the value in this particular case?

A. That particular location, I should say no.

Q. You mentioned that you graduated from Notre Dame. In what activity. I mean what type of degree did you get?

A. MA, Master of Arts.

Q. Now, you did mention that you had made a survey of the Palm Springs area in connection with the pipe line right of way acquisition.

A. Yes sir.

Q. And my notes indicate that you said that you took in an area approximately two or three miles on either side of the line. Is that correct?

A. A general area in the appraisal of the property for rights of way two to three miles on each side of the line is correct. Around cities we took an area that ran possibly, [47] oh, six to nine miles of the line, and not necessarily on both sides but in the developed country.

Q. When was it you made this Palm Springs survey in connection with the big-inch pipe line?

A. 1946.

(Testimony of Joseph A. Gallagher)

Q. Is that when you had the aerial photograph taken? A. No, sir.

Q. Without going into too much detail, tell us what you mean when you say you made a survey of Palm Springs in 1946 in connection with the big inch pipeline; just what did you do?

A. Well, I was trying to. At the time that we were ready to run our line or to construct our line we were following The Edison Company that had constructed a line through there. We were following the telephone company that was then constructing or getting ready to construct the co-axial cable, and we ran into quite a few complications. I was asked by certain members of The Edison Company whether or not I hit the \$5,000 an acre man. I said, "\$5,000 an acre man—who is he or where is his property located?" "You will soon find out."

Some of the boys of the telephone company asked me whether or not I ran up against the man that wants \$5,000 an acre. They would not tell me who this man was nor where his property was. [48]

So, in my investigation, trying to ascertain where there was someone who would ask around \$5,000 an acre for a right of way, or on the basis of \$5,000 an acre for a right of way, I was studying those properties. I knew it was not east of Blythe or east of Indio, because properties east of Indio, in my opinion, did not have a value anywhere near that value. It must have been some place between Indio and possibly Banning or Beaumont.

We were coming in north of the highway. In try-

(Testimony of Joseph A. Gallagher)

ing to discover what values were I consulted with the manager of the Alonzo Bell property which is one of the finest grape lands, I guess, that we have in the State of California, and that is east of Blythe or west of Indio. I conferred with several property owners there where the date palms are. In other words I was stretching myself out in order to find out what some of these values were and when I did hit up with this property owner I would know what I was confronted with.

We naturally were hitting in close to Banning, and so I ran the investigation as I say, just as far apart, the line, as far apart of the highway, south of the highway, as I possibly could in order to get a good estimate of value in there because I knew I would have to appear in any case the gas company might have that might go to condemnation, which I did.

Q. Did you find the \$5,000 land? [49]

A. I did.

Q. Where was that located?

A. At Thousand Palms, Charley Boyle.

Q. Where is Thousand Palms with reference to Palm Springs?

A. Thousand Palms is at the north end of Ramon Road where Ramon Road crosses the highway.

Q. Mr. Gallagher, I think in your direct examination you referred to the north end of Ramon Road. Does not Ramon Road run east and west?

A. Yes. East. I beg your pardon. It is east. That is right.

(Testimony of Joseph A. Gallagher)

Q. How far is Thousand Palms from this area?

The Court: Do you mean from the Palm Springs area?

Mr. Brett: From the Palm Springs area.

A. Oh, I should say about four and one half miles.

Q. And did that line run through Thousand Palms?

A. North of Thousand Palms; yes, sir.

Q. I notice throughout your testimony you have referred to "we," and so forth. In making this particular investigation respecting the properties that are here under consideration was this data accumulated by others and then considered and utilized by you, or did you yourself obtain the data?

A. It was accumulated by myself and by other members of my company. [50]

Q. How many all told aided in the accumulation of data? A. One.

Q. Who is the one? A. My son.

Q. In other words, then, it was accumulated either by your son, Joseph Gallagher, Jr., or by you? A. Yes, sir.

Q. And I believe you said that you then personally checked the material before it went into the report as to its accuracy? A. Yes, sir.

Q. Do you mean by that that you examined notes that were taken by both of you to be sure that it was properly embodied, or do you mean by that, that you checked the source of information that was obtained except by yourself?

(Testimony of Joseph A. Gallagher)

A. I checked both the source and also the report that was turned over to me.

Q. You stated that you had made some appraisal for Bob Hope?

A. Yes sir.

Q. When was that made? A. 1946.

Q. What was the subject matter of that particular appraisal? [51]

A. Bob Hope is interested in Palm Springs, very much interested in Palm Springs. Bob Hope is interested in having a broadcasting station at Palm Springs. He has already bought two houses at Palm Springs. His wife had never invested any money in real estate and she was interested in making an investment at Palm Springs.

I called Culver Nichols' office and asked him to find some property there that I might present to Deolores Hope. Culver Nichols turned it over to a Mr. Hoover in his office. He located three lots. Mrs. Hope bought those lots for \$15,000. The approximate square-foot area was around 18,000. They were in Section 15. Bob has asked me——

Q. I did not ask you what he asked you.

A. I beg pardon.

Q. That was the subject matter, then, of the appraisal?

A. That is right; yes, sir.

Q. Three lots in Section 15?

A. And then for a location for a broadcasting station.

Q. All right. Where was that located?

(Testimony of Joseph A. Gallagher)

A. We have not found a location as yet.

Q. Where in Section 15 were those lots located, Mr. Gallagher?

A. I should say about a thousand feet west of Palm Canyon Drive in Las Palmas tract.

Q. Can you point them out on either of these maps [52] and indicate their locations?

A. I do not have the numbers of the lots clear in my mind at this time. This is Section 15—or Section 10. These three lots were in Section 10 of Las Palmas tract. They are located, I believe on Verbena, Verbena Road or Verbena Del Road, right in this general area.

Q. You can't identify the specific lots?

A. Not now; no, sir.

Q. That area that you have just referred to is one of the earliest areas of homesites in Palm Springs, is it not? A. Yes, sir.

Q. And it is surrounded by very substantial homes? A. Yes, sir.

Q. Ranging in value of approximately what?

A. Oh, I should say \$25,000 to \$125,000, maybe more than that.

The Court: That area is north and east of the so-called Arenas lots in Section 14?

The Witness: I should say, your Honor, north and west.

The Court: I should say north and west, also. North and west across what road or street or highway is it?

The Witness: Across Palm Canyon.

(Testimony of Joseph A. Gallagher)

The Court: That is the main street of Palm Springs?

The Witness: Yes, sir. [53]

The Court: How far would it be between the Arenas lots in Section 14 from those three lots, the Hope lots?

The Witness: I should about a mile and a quarter.

Q. (By Mr. Brett): And you say that those lots sold for how much money?

A. \$15,000.

Q. Apiece or——

A. Three of them.

Q. Three of them; \$5,000 apiece?

A. Yes, sir.

The Court: How far would the Hope lots be from the post office of Palm Springs?

The Witness: About three-quarters of a mile.

The Court: How far are the Arenas lots in Section 14 from the post office?

The Witness: Well, about a quarter of a mile, if that far. May I say something else about those three lots?

The Court: You may.

The Witness: Before those lots were out of escrow Hoover called me and told me he had a doctor in Laguna Beach who was interested in the lots and would pay \$30,000 for the three lots. I asked Mrs. Hope whether or not she would sell and she said, "No." The deal was still in escrow at the time.

Mr. Brett: If the court please, there was no pos-

(Testimony of Joseph A. Gallagher)

sible [54] way I could anticipate that. I object to it and move to strike it as hearsay.

The Court: Motion granted.

Would you point out for me on the map there where the Oasis Hotel is, where it would be on Exhibit A?

The Witness: No, I could not, your Honor. I do not know just where the Oasis Hotel is.

Mr. Preston: It is south of Desert Inn.

The Court: Can you point out where the post office would be or The Desert Inn?

The Witness: Well, The Desert Inn is just about in here, and the post office——

The Court: You are referring to a point on the red line which is the main street of the town?

The Witness: This is Palm Canyon Drive.

The Court: And almost due west of the Arenas lots?

The Witness: Yes, sir.

The Court: Where are the springs, the bath houses?

The Witness: The bath houses are just—— they are on Indian Avenue.

The Court: That would be a block east of the main street of the town?

The Witness: A block east; that is right.

The Court: And how far from the Arenas lots?

The Witness: I should say about 700 feet, 700 to a [55] thousand feet.

Mr. Brett: Do we have a red pencil here? Had you completed, your Honor?

(Testimony of Joseph A. Gallagher)

The Court: Yes.

Q. (By Mr. Brett): Would you be kind enough, Mr. Gallagher, to indicate on the map your recollection of the location of The Desert Inn, upon Government's Exhibit A, and your recollection of the location of the bath house on Exhibit A?

A. I do not have the location of The Desert Inn very clear in my mind, but I believe that would somewhat describe the location.

The Court: How have you marked it? How have you identified it?

The Witness: I have an "X," your Honor, on Desert Inn. I have it just north of Tahquitz, Tahquitz Drive, right in that general area of Tahquitz Drive.

The Court: You mean on the west side of Palm Canyon Drive?

The Witness: Yes, sir.

The Court: How have you identified the bath house?

The Witness: Indicated that by an "X," which would be on the east side of Indian Avenue between Arenas and Baristo Roads.

Q. (By Mr. Brett): Would you be kind enough to mark [56] the two indications that you have made—Desert Inn as "A" and the bath house as "B"?

(Witness marking on Government's Exhibit A.)

Q. You understand, Mr. Gallagher, that this written report that you made to counsel has been

(Testimony of Joseph A. Gallagher)

received in evidence as a part of your testimony in chief? A. Yes, sir.

Q. Now, you have not stated orally any valuations or identification of valuations, but in this report you have disclosed, on page 15——do you have a copy of the report? A. Yes, sir.

Q. ——that your estimate of fair market value of what you designate as Parcel A and describe as Lot 42 and what you designate as Parcel B and describe as Lot 47 is each in the sum of \$40,000?

A. Yes, sir.

The Court: Before you proceed——

Q. 42, as I understand it, is in reality 46—— oh, pardon me, your Honor.

The Court: Before you proceed, let us ask the witness if the figures stated on page 15 of Exhibit 14 and the valuations, as well, summarized on page 22, state his present opinion as to the fair market value of the lands there described. [57]

The Witness: Yes, sir.

Q. (By Mr. Brett): I referred to page 15 as to Parcel A which is described here as “Lot 42.” You intended “46,” did you not?

A. 46, yes, sir; 46.

Q. Those, in other words, are the two contiguous parcels that are located in Section 14?

A. Yes, sir.

The Court: Is it stipulated, gentlemen, that figure may be corrected on the original Exhibit 14?

Mr. Preston: So stipulated.

(Testimony of Joseph A. Gallagher)

The Court: To read "Lot 46 of Section 14," instead of "Lot 42 of Section 14"?

Mr. Clark: We do, your Honor.

The Court: Do both sides so stipulate?

Mr. Brett: So stipulated; yes, your Honor.

The Court: I will make that correction in ink.

Q. (By Mr. Brett): Now, Mr. Gallagher, on page 1 of this report you state that the "appraisal is made for the purpose of determining attorney's fees" and "for the purpose of estimating its fair market value as of current date." Did you intend thereby to distinguish in your mind or in the estimates that you were making a difference in values for the two purposes therein mentioned?

A. My only thought was to establish a value which, in [58] my opinion, was a fair market value of the property, and the purpose of the assignment to make the report was to enable the court to establish what the attorneys' fees would be.

Q. Now, I direct your attention to the fact that on the pages 14 and 15 you state that you gave consideration to seven separate forms of value, the first being "Neighborhood Value"; the second being "Sale Value"; the third being "True Value"; the fourth being "Utility Value"; the fifth being "Fair Cash Market Value"; the sixth being "Use Value"; the seventh being "Value for Subdivision Purposes." Did you intend by said description to indicate that you were concluding that the property had separate and distinct values for those purposes that I have just described? A. No sir.

(Testimony of Joseph A. Gallagher)

Q. What is your personal definition or description of what you conceive to be and utilize in your definition of "Fair Market Value"?

A. A market value is the highest price in terms of money which property will bring when offered for sale in the open market, allowing reasonable time to find a purchaser who buys with full knowledge of the uses and purposes for which the property is adapted or for which it is capable of being used.

Q. You have referred in your oral testimony and you [59] Annex in the written report as the last drawing, to the fact that there existed at the time of your inquiry and at the date of your valuation a certain zoning ordinance of the City of Palm Springs; and you have attached, as I have stated, a copy of the map indicating the locations wherein those zoning requirements apply, is that correct?

A. Yes, sir.

Q. Will you kindly examine the document that I—

Pardon me just a moment. I understand, under the rules, the clerk should mark for identification, so at this time I will ask that a map which bears the title "Official Land Use Plan—City of Palm Springs California" be marked for identification as Government's exhibit.

The Clerk: B.

The Court: Respondents' Exhibit B.

The Clerk: Respondents' Exhibit B for identification.

(Testimony of Joseph A. Gallagher)

The Court: It is offered on behalf of both respondents, I take it?

Mr. Brett: Yes, sir; that is correct.

Will you please examine Respondents' Exhibit B for identification and state whether or not that is a copy of the document you referred to in your oral testimony and a copy of which is in your report?

A. Yes, sir.

Mr. Brett: May I place this on the easel? [60]

The Court: Do you offer it in evidence, Mr. Brett?

Mr. Brett: Yes; I desire to offer it in evidence at this time.

Mr. Preston: There is no objection.

The Court: Very well, Respondents' Exhibit B for identification is received into evidence.

Q. (By Mr. Brett): Did you assume for the purposes of your investigation and in drawing your conclusion that these zoning requirements would apply to the hypothetical purchaser who would acquire the property at the value which you have fixed?

A. I believe all zoning locations are very necessary to be considered in determining and arriving at an opinion of value; and this new zoning at Palm Springs is something which went into effect in 1947. I believe it was September of 1947, and after properties were rezoned, property took a valuation in locations somewhat in excess of what the valuations were previous to the time of that zoning.

The Court: Did you consider that zone in arriv-

(Testimony of Joseph A. Gallagher.)

ing at your estimate which you have given us as your opinion?

The Witness: Yes, sir.

Q. (By Mr. Brett): In other words, that was one of the elements that went in to make the total figure which was your conclusion as to value?

A. Yes, sir.

Q. Now, you have indicated in your report that you [61] gave consideration to "neighborhood value" and make the statement on page 14 that "value of property depends upon neighbors. The neighborhood is in the stage of integration." When you referred to the fact that the neighborhood is in the stage of integration just what do you mean?

A. That the neighborhood is in the stage of improvement.

Q. And what neighborhood were you referring to?

A. To the properties in the four sections surrounding Section 14 and in three sections surrounding Section 26.

Q. In fixing your estimate of value did you take into consideration the present adaptability of the property? A. Yes, sir.

Q. I assume, then, that your valuation that you have made here is on the conception that this hypothetical transaction would be between a fee seller and a fee buyer without restrictions?

A. Yes, sir.

Q. Well, now, in connection with that conception——

(Testimony of Joseph A. Gallagher.)

The Court: "Without restrictions"—do you refer to the zoning restrictions or to the title restrictions?

Mr. Brett: I am referring to the title restrictions.

The Witness: That is right; my answer is "yes, sir" to that.

Q. (By Mr. Brett): In other words, you did not give [62] consideration to the fact that that particular property, as well as the other parcels which are the subject matter here, are vested in the United States of America and that there are very definite legal restrictions upon either conveyance or encumbrance of the property?

Mr. Clark: Just a minute. I desire to interpose an objection to that question upon the ground that it assumes that the title is in the United States of America.

The Court: Sustained. Did you assume that your hypothetical buyer would acquire an unimpaired fee simple title to the property?

The Witness: Yes, sir.

Mr. Brett: Did I understand your Honor sustained the objection?

The Court: I sustained the objection to the question. I think the witness has testified to what you want to know. He says that he has assumed that this hypothetical buyer would acquire an unimpaired fee simple title to the land. I take it that throughout we are dealing with the full ownership, aren't we?

The Witness: Yes, sir.

The Court: That is what you dealt with?

(Testimony of Joseph A. Gallagher.)

The Witness: Yes, sir.

Q. (By Mr. Brett): Now, Mr. Gallagher, what did you assume with reference to all of the lands which are immediately [63] contiguous north, east, south, and west of the parcels which are shown on the Respondents' Exhibit A as numbers 46 and 47; that is, did you assume that those lands, likewise, were freed of any title restrictions; were such that any person could develop them without restriction and without limitation, or did you assume that those lands, as distinguished from parcels 46 and 47, continued to be owned by the United States and subject to complete restriction as to either sale or encumbrance or any development other than as approved by the Secretary of Interior of the United States?

Mr. Preston: I object to the use of "ownership by the United States."

The Court: Sustained. What you are asking him, Mr. Brett, and what you want to know is laying zoning restrictions aside, did he assume that the buyer would have a full and unimpaired fee simple title to this property and, hence the right to use it and enjoy it as he saw fit.

Mr. Brett: I am afraid, your Honor, that that is not my question. I can, of course, have it reread or I will explain it.

The Court: I understand your question.

Mr. Brett: My question is this: I want to know whether this witness, in fixing the value, considered the legal situation as it exists, which is that all of

(Testimony of Joseph A. Gallagher.)

this other land surrounding it on every point in that section is owned by [64] the United States, is tribal lands.

The Court: Why don't you ask him if he considered it was tribal land? But for us to get into the calculations of this witness as to the quality of the title held by the United States, it seems to me to be irrelevant. He has stated that he assumed that his hypothetical buyer would be just like any ordinary buyer, would acquire a full and unimpaired fee simple title, and by that, to lay zoning restrictions and other restrictions imposed by governmental agencies to one side.

Mr. Brett: I understand that.

The Court: We are speaking of the impediments in the title, and he said that he assumed there were none except for zoning restrictions, and, as I understand it, any restrictions that might be imposed by governmental agencies.

The Witness: Yes, sir.

Mr. Preston: That is true, your Honor, as to parcels——

The Court: That covers the restrictions, doesn't it?

Mr. Brett: No, sir.

The Court: Whatever restrictions you have are covered by law or by governmental agency.

Mr. Brett: I do not believe that it does, your Honor, if you will permit me. What I am now examining him on is not as to these particular parcels. He has answered that he has this conception,

(Testimony of Joseph A. Gallagher.)

which, of course, has to be hypothetical. [65]

The Court: Let me go one step farther, then. Perhaps we can save some time.

Did you make the same assumption in dealing with and arriving at your opinion as to the value of the surrounding properties?

The Witness: Yes, sir.

Q. (By Mr. Brett): Including all of the areas that are in the Indian owned sections?

A. Yes, sir.

Q. Then, I take it that, as a part of that assumption, you assumed that the remaining portion of Section 14 which is contiguous to parcels 46 and 47, at the date of your valuation were available to being purchased and sold by private parties and developed by private parties in the same manner as the lands which are at present private owned and lie within the boundaries of Sections 11, 13, 23, 10, 15, 27, and 25?

A. I assumed that the same conditions existing on parcels 46 and 47 would be the conditions existing under the same circumstances on other parcels throughout section 14.

The Court: You call them "parcels"; you are referring to lots?

The Witness: Lots. [66]

The Court: 46 and 47 of Section 14?

The Witness: To lots. Thank you, Judge.

Mr. Brett: I submit, if the court please, that that is not an answer to my inquiry of the witness. I will ask that the question be read.

(Testimony of Joseph A. Gallagher.)

The Court: Please read it, Mr. Reporter.

(Question read by the reporter.)

A. My answer to that is yes, sir.

Q. (By Mr. Brett): Did you personally investigate on the ground both the property which is described on Respondents' Exhibit A as lots 46 and 47 and the remaining portions contiguous thereto and lying within section 14?

The Witness: Would you mind repeating the question, please?

The Court: Please read it, Mr. Reporter.

(Question read by the reporter.)

A. Yes, sir.

Q. (By Mr. Brett): Will you state to the court briefly what you discovered as to the nature of the improvements and the type and character of occupancy, that is, the description of the people who were occupying it, that you discovered from that investigation?

A. I discovered that those buildings took on the nature of shacks; that the property was undeveloped, was not properly developed; that people living in the buildings, [67] there were quite a few colored families and there were quite a few other families living there. I took all that into consideration and made a recommendation in my report as to what I thought should be done.

The Court: That is all covered, I think, Mr. Brett, at the bottom of page 8 and the top of page 9 of Exhibit 14.

(Testimony of Joseph A. Gallagher.)

Mr. Brett: I think that is true.

Q. And that recommendation was that the Indians and the Negroes and the people of low income, generally, who were occupying this miscellaneous assortment of buildings which you have described as "shacks" should be removed from the premises and the entire section 14 put to a higher utility?

A. I believe that the report shows that there is no racial prejudice whatsoever in that recommendation of mine.

The Court: Did you assume, in arriving at your opinion, that the property would be put or was available to be put to the highest and best and most efficient possible use?

The Witness: Yes, sir.

The Court: Does that cover the situation?

Mr. Brett: No; it does not, your Honor, because I am referring——

The Court: It is not helping me, Mr. Brett. It may help some higher court, but it is not helping me, this line of questioning. It is all in the report here. [68]

Mr. Brett: I always hesitate to either abandon or——

The Court: What is it?

Mr. Brett: What I want to get at is this, your Honor: I want to find out—and maybe I can ask it in one question.

Q. In fixing your value of 46 and 47 did you fix it in the light of the fact that you are assuming that either the purchasers thereof themselves could

(Testimony of Joseph A. Gallagher.)

control the rest of this area and clear it out, or that other facilities, either the city or other developers, could clear that area from its present more or less slum appearance, could put in streets, could put in sanitation, and could improve the other contiguous areas in Section 14 the same as has been done in the white owned sections outside of Section 14?

A. I assumed that it could be done or should be done.

Q. That is, you fixed the value in the light of that condition and assuming that the purchaser who would acquire the property at your valuation would be able to have the benefits of such a development of the entire section?

A. I have fixed my value on the assumption that the present use is not the proper use. I fixed my value under what I consider to be the highest, best and most profitable use of the property in Section 14.

Q. Well, let me ask you this question:

I don't think that answers the question, your Honor, and I will try another. [69]

Did you fix your value, assuming that someone would pay \$20,000 an acre for these parcels if the remaining sections continued exactly as you saw it, or did you fix it only assuming that such a purchaser or others with whom he might co-operate could change the conditions as you recommended?

A. I will have to answer your question just the way you answered that of mine, that I did not consider the present use to be the proper use, but I

(Testimony of Joseph A. Gallagher.)

gave my opinion of value as to the highest and best use that the property is adapted for.

The Court: Did you assume that all the property in Section 14 and all the property in its vicinity was available in the market to be bought and sold and put to its highest and best and most efficient possible use?

The Witness: Yes, sir.

Mr. Brett: I think that answers my question.

Q. And that was the basis, then, of your ultimate conclusion which you have fixed at—what is it, \$20,000 an acre? A. \$20,000 an acre.

Q. Now, let me ask you this: Assuming, instead of the predicate which you have just stated, that Lots 46 and 47 could be released of all governmental restrictions—and by that I am not referring to the zoning restrictions of the City of Palm Springs—but would be subject to those zoning restrictions, but also assuming that as to the [70] remainder of Section 14 the conditions would continue as they now continue and would not, insofar as the purchaser was concerned or insofar as the public making up the community known as Palm Springs was concerned, be subject to any control or change, would that change your opinion as to the value of parcels 46 and 47?

A. I could not possibly assume, Mr. Brett, that an exception would be made for subject parcels and the rest of the property be sort of penalized.

The Court: Mr. Gallagher, assuming that Lots 46 and 47 are free and available for unrestricted

(Testimony of Joseph A. Gallagher.)

use, unrestricted buying and selling, as you have assumed in arriving at your valuation now assumed, and also that the remainder of section 14 is tribal Indian land which is under the control of the United States Government, the Department of the Interior, as to use and is unallotted Indian land belonging to the tribe, and hence can only be used for the purposes for which it is now being used or for some other purpose which might be approved by the Secretary of Interior, would that affect your opinion as to the value of Lots 46 and 47?

A. No, sir. No, sir.

Q. (By Mr. Brett): What do you find to be the zoning requirements as to parcels 46 and 47 under the zoning ordinance of the City of Palm Springs, and assuming that those lots were free from restrictions and passed into the [71] hands of a private purchaser?

A. I think proper zoning for this should be—
The Court: What is the zone?

The Court: What does that mean?

The Witness: R-1 is single family residences.

Q. (By Mr. Brett): And what area is required under that zoning ordinance?

A. For Indian land, 7500 square feet.

Q. And how many square feet are there in Lots 46 and 47?

A. You have two acres; 43,560 square feet to an acre times two. You are up to around 80—well, 43,560 times two, 89,120.

Q. Now, take 7500, dividing that by 7500, ap-

(Testimony of Joseph A. Gallagher.)

proximately how many homesites could be placed under this R-1 single-family residence zoning within that area?

A. Well, I believe that, using that square-foot area of 10,000, we can get about 4.74 houses to an acre.

The Court: Under this restriction you would get about 11, would you not?

The Witness: That is right.

Q. (By Mr. Brett): 11 houses, then, in that area. And they are single-family residences. That would be the restriction, and what value range?

The Court: Do you mean what cost is specified in the range by the ordinance? [72]

Mr. Brett: Yes; what value cost range is specified in the ordinance?

A. Oh, \$15,000 up to \$25,000.

Q. Do I understand, Mr. Gallagher, that it is your opinion that, as of this date and assuming that all the lands surrounding Lots 46 and 47 are still vested in the United States in trust for this Indian tribe, and is not subject to be sold or liened or to be otherwise used than it is at the present, excepting subject to the approval and control of the Secretary of Interior—it is your opinion that purchaser, knowing those facts, having in mind that all the area contiguous thereto is surrounded by small building, some of which you have described as shacks, resided in by Negroes and by Indians and by whites and others of rather limited financial ability, and that the purchaser would have no means

(Testimony of Joseph A. Gallagher.)

of controlling this contiguous area and would be required to erect no more than 11 single-family structures, each of which would at least have to cost a minimum of \$15,000, and would have no way at this time of knowing when, if at all, a change would be made in the contiguous area, that having those facts in mind the hypothetical seller would be able to sell to that hypothetical buyer these two lots comprising four acres for cash at \$20,000 per acre?

A. May I indicate——

Mr. Brett: If the court please, I think it would be [73] proper——

The Witness: The question is such a long question.

Mr. Brett: Pardon me just a moment, Mr. Gallagher. I think it would be proper at this time to request, at least, that he answer yes or no and then give his explanation.

The Court: What you are asking him is if these assumptions you have named change his opinion, is that it, or would he still say under those assumptions it is worth \$20,000 an acre?

Mr. Brett: I suppose that is one way of stating it; yes, sir. I accept the amendment.

The Court: Do you understand the question? Would you still say under those assumptions that the property is worth \$20,000 an acre?

The Witness: Yes, sir. May I explain my answer?

The Court: Yes.

A. We not only have R-1 zoning, but we have

(Testimony of Joseph A. Gallagher.)

C-2 zoning on Indian Avenue. 150 feet east of Indian Avenue and for a distance of 200 feet east of the westerly line of that C-2 zone, we have R-3 zoning. R-3 zoning will be running into multi-units. We have E-2 zoning in there. E-2 zoning would be for guest ranches. We have T zoning, which is for trailer camps, and these trailer camps are making a tremendous amount of money now.

I think I am tied down to too tight a position there [74] in that answer of mine, because these other zone areas are in Section 14. I think that they should be considered. I am trying to consider them in answering the question.

Q. (By Mr. Brett): First, I will ask you this: None of the zonings which you have referred to, to-wit, the business zoning which is immediately adjacent to Indian Avenue, the R-3 zoning which is a small strip that lies just back of the business zoning on the borders of Indian Avenue, or the trailer zoning which you have referred to, affect or apply to Lots 46 or 47? A. That is right.

Q. Well, now, did you in your investigation, either personally or through consultation with counsel, ascertain that the then existing and present existing restrictions on the use of all of Section 14 was limited to revocable permits that could be revoked within 30 days?

A. I hope I am answering your question correctly. As I got it, I gave no consideration whatsoever to the rentals received from the buildings or the existing structures. I consider those rentals to

(Testimony of Joseph A. Gallagher.)

be poor business, poor management. I think the property should receive a rental far in excess of what it is receiving. I think that for a great many reasons.

Q. Now, just a minute, Mr. Gallagher.

Mr. Clark: He is not through yet. [75]

Mr. Brett: I submit that is not an answer to my question, your Honor, and I do not desire to have him go on. My question did not ask that. I asked him if he considered the status that actually exists.

The Court: He said "no" several times, as I understand his testimony. His opinion is based upon the assumption that all this land is available and is to be used—that is, not only the *lost* 46 and 47, but the surrounding territory in Section 14 is available to be put to the highest and best and most profitable or most efficient use. Isn't that correct, Mr. Gallagher?

The Witness: Yes, sir.

Mr. Brett: Then I have no further questions on that point, if that is his testimony.

The Court: Are you about finished?

Mr. Brett: Sir?

The Court: Are you about through?

Mr. Brett: No; I am not, your Honor.

The Court: I am adjourning for the day.

Mr. Brett: I appreciate that, but there are other matters here.

Mr. Clark: The witness will return, your Honor, of course.

(Testimony of Joseph A. Gallagher.)

The Court: That is not helping me any, but you may wish it for your record. [76]

Mr. Brett: I never wish anything for the record. I wanted to go into some of his properties here and show what they consist of and show his manner in arriving at his opinions. Do I understand that that will not help your Honor?

The Court: It won't help me. It is all here in his report.

Mr. Brett: Well, I think, your Honor, it needs some development, and I am not sure that your Honor could——

The Court: We can spend days on this, and what it all adds up to is one man's opinion.

Mr. Brett: That is true. But, your Honor, sometimes we have to realize——

The Court: I do not wish to limit you, Mr. Brett. If you wish to proceed, you may do so. I am merely indicating that to me this is a very minor phase of this proceeding. I expect to hear the expressions of opinion.

Mr. Brett: I understand.

The Court: But once the property is described and the circumstances are described, it is just as helpful to me if the witness sat down and said: My opinion of the value of this property is X dollars, and let it stand, because we are going to undoubtedly have some very wide differences of opinion as to the value of this property.

Mr. Brett: There is no question about that. Your [77] Honor is aware of that and I believe——

(Testimony of Joseph A. Gallagher.)

The Court: All right. Mr. Gallagher has told us what his values are. He has put them down in this voluminous Exhibit 14. What is to be gained by going over it and over and over again? He has demonstrated that he has that same opinion throughout your examination. He has not changed it at all.

Mr. Brett: That is true, your Honor. And at least I would like to find if he had the same conception as to the other lands, as a basis for the motion to strike. And there are a couple of other factors that I would like to get in. I wanted to go into more detail, but I think if you have the opportunity to assistance of counsel to see what this is made of, it will be helpful. Now, if you say it won't, however, I do not want to take the court's time.

The Court: You mean you wish to cover it as to the other property.

Did you make the same assumptions with respect to all this Arenas property?

The Witness: Yes, sir.

The Court: All the property which you testify you have given us your opinion as to value of?

The Witness: Yes, sir.

Mr. Brett: May I make this query, then, if the court please: If it should develop that at the argument in [78] connection with this value, that certain factors are not clear, may I have leave then to ask Mr. Gallagher to come back for further examination?

The Court: I do not wish to limit you now, Mr. Brett. I merely offer that suggestion because we can

(Testimony of Joseph A. Gallagher.)

spend days on this question of value. My present view of the matter is that that is a very minor phase of this matter.

Mr. Brett: You mean the present value?

The Court: Yes. It would be very difficult to show me that it would be wise for me to attempt to make an award predicated upon the present value of this property. If an award is made, I would be inclined to make it on the basis of percentage, which would rise or fall with the valuation of the property.

Mr. Brett: That is true. But, of course, then as an incident would have to be what is the value that we have to get to. I mean that is the cornerstone of whatever we are taking a percentage of.

The Court: Yes; it is helpful to know whether we are dealing with a million dollars or a thousand dollars. That is very helpful in determining a percentage.

Mr. Brett: Your Honor, I am going to abide by the court's suggestion, but I would like to ask just two more questions and then I will close on this matter, if I may. I want to ask one other phase of his methods. [79]

The Court: I do not wish to limit you, Mr. Clark suggests Mr. Gallagher will come back. And we will recess at this time until 9:30 tomorrow morning.

(Whereupon, a recess was taken until 9:30 o'clock a.m. of the following day, Thursday, February 12, 1948.) [80]

Los Angeles, California

Thursday, February 12, 1948, 9:30 a.m.

(Case called by the clerk.)

The Court: You may proceed.

Mr. Clark: Your Honor, may I suggest that we learned over the adjournment that there had been omitted from Exhibit 14, the Gallagher report, the copy of the zoning map of Palm Springs containing his notations upon it which should be a part of it. May I present it to the clerk?

The Court: Is there objection?

Mr. Brett: May I ask Mr. Clark a question, if the court please?

The Court: Yes.

Mr. Brett: Do I understand that the map which is in the copy that you delivered to me is not in the one that is the exhibit?

Mr. Clark: That is right; the zoning map.

Mr. Brett: Then there would be no objection.

The Court: Than that map, the zoning map, will be received into evidence and marked Petitioners' Exhibit 14-B.

Mr. Brett: If the court please, I understand that that exhibit was to be received—I am referring now to the appraisal report, and therefore I take it that this is, too—merely as a portion of this man's testimony or as illustrative of his testimony? In other words, I do not [81] want to be stipulating to evidenciary matter there, but merely that it is a part of his testimony.

The Court: It is my understanding that it is

offered for the purpose that you stated, merely to supply a portion of the direct testimony of Mr. Gallagher.

Mr. Brett: With that understanding, I have no objection.

Mr. Preston: 14-A is also a map, is it not, your Honor?

The Court: This was Exhibit 14, the Gallagher report, and is in reality now composed of the book, Exhibit 14, a map, Exhibit 14-A, and the map just now admitted, the zoning map, Exhibit 14-B, all admitted into evidence for the same purpose.

When does the trust patent expire here by its provisions and terms?

Mr. Brett: In May of 1952; is that not correct? Wait just a moment.

Mr. Preston: May the 9th, 1927 plus 25 years.

The Court: That would be May 9, 1952.

Mr. Brett: Which is correct.

Mr. Preston: But Mr. Brett, I think, contends that the time has already been extended, don't you, to '62 or '67? The President, every so often gives a general order extending these restrictions, and it is in the briefs here contended by Mr. Brett, I am sure, that this particular [82] restriction has been extended another period.

The Court: Mr. Brett asked some questions yesterday to which I sustained objection due to the form of the question, without suggesting they could be reached in another manner. I had in mind asking Mr. Gallagher if his opinion would be different if he assumed that there was such a trust patent.

Mr. Brett: I expect to go into that, your Honor.
The Court: Very well.

Mr. Brett: However, of course, I do not want to preclude in any way the court's questioning.

The Court: No. I just wanted you to know that I was not precluding that type of cross examination in my ruling.

Mr. Brett: Yes, sir. I desire to have the clerk mark a document, a printed document that I will hand him. The pages are unnumbered, but it bears the heading on the first page: "Ordinance No. 180 Palm Springs Land Use Ordinance" as the respondents' next exhibit for identification.

The Clerk: C for identification.

Mr. Clark: We are willing, your Honor, if it suits the convenience of court and counsel, it may be received in evidence.

Mr. Brett: Then I will offer it in evidence.

The Court: Is that the zoning ordinance of Palm Springs? [83]

Mr. Clark: Yes, sir.

The Court: Respondents' Exhibit C for identification is received into evidence.

JOSEPH A. GALLAGHER (Recalled)

Cross Examination (Resumed)

By Mr. Brett:

Q. Mr. Gallagher, throughout your report you used the term "valued at" or "having a value of", and, upon having an opportunity to examine——

Your Honor, I do not see any record of this map. I will have to look at my notes.

(Testimony of Joseph A. Gallagher.)

The Court: That map is Exhibit 14-A.

Mr. Brett: Is that 14-A.

Q. —Exhibit 14-A, I note that a substantial part of the notations which are set forth thereon with reference to numbers that are in circles state that the value is based on the assessment. First, I will ask you: These notations on Exhibit 14-A that are in handwriting are notations that were either placed there by you personally or under your supervision? A. By me personally.

Q. And the numbers which are in the circles are the same numbers that you listed in your appraisal report, which is Exhibit 14, under the heading of "list of Comparables" and being on pages 23 to 25, inclusive, is that not correct? [84]

A. There is quite a variance in the numbers in the map that is under exhibit at the present time and the numbers stipulated in the appraisal report. I do not think the two of them would wholly correspond. I put those numbers in certain instances and in the majority of instances they do. I indicated or I marked those numbers on that map so that in case you have asked any questions regarding my method of information, that I could point to it and point to it in a hurry; so that what you have in the appraisal report, the numbers there may not exactly correspond with the numbers on that map, though I believe I can tie the map right into the appraisal report without too much difficulty.

Q. We won't take time for that. I will ask this question: Is it a fact and am I therefore correctly

(Testimony of Joseph A. Gallagher.)

interpreting your report, that a substantial number of the values which you have set forth in your report as comparable properties is based upon the assessment rolls of those properties to which you have applied some percentage in arriving at the total value? A. That is correct.

The Court: What percentage did you assume the assessed value was to the total value?

The Witness: The information that we received from Mr.— [85]

The Court: No. What did you assume?

The Witness: 15 to 20 per cent. Property is assessed on a 15 to 20 per cent of its valuation.

Q. (By Mr. Brett): Now, in making your calculations for the purpose of determining the average value per acre of the white owned sections of land which bounded the Indian section on which you were making your valuation in this case did you utilize the computations that you made in that manner?

The Witness: Would you repeat the question, please?

Mr. Brett: Perhaps I can make it simpler rather than repeating it, because I want you to thoroughly understand it.

Q. You have testified orally and you have set forth in several places in your report that in fixing the value of the two parcels numbers 46 and 47 which are in the Indian section 14, that you arrived at that valuation per acre in the sections which immediately surround that, that is Section 11, Sec-

(Testimony of Joseph A. Gallagher.)

tion 15, Section 23, and Section 13, as applied to Section 14. Now, my question is: That having those statements in mind, in arriving at your conception and conclusion as to the average acreate value of these surrounding sections did you use the valuations which you arrived at through first obtaining the assessments and then applying your mathematical percentage? [86]

A. Is that a yes or no answer? May I have a——

The Court: Answer it any way you please, Mr. Gallagher. Please let us move on. Did you multiply them by five, the assessed valuations by five?

The Witness: Yes, sir.

The Court: Is that the way you arrived at your opinion as to the value of the surrounding property?

The Witness: Yes, sir.

Mr. Brett: Now, one other question on that line and that is all on that.

Q. Did you use the over-all assessment for each parcel?

A. What do you mean by the over-all assessment?

Q. Well, in other words, you have shown in your report a number of these properties were improved, some were vacant. Now, did you take the assessment, for instance, if it was an improved property, the over-all assessment value?

A. I took the assessed value on land and improvements, the over-all assessment.

Q. The over-all assessment? A. Yes, sir.

(Testimony of Joseph A. Gallagher.)

Q. Then, this one new question: In that respect, as I understand it, Section 15, for example, that is the very heart of the business section of Palm Springs, is it not? A. Yes, sir. [87]

Q. It contains such properties as The Desert Inn, Bullocks, Robinson's, the bank, motion picture theatre, etc., doesn't it? A. Yes, sir.

Q. And you then lumped the total assessed value of those improved properties in figuring your average acreage value of Section 15? A. Yes, sir.

Mr. Preston: Section 14?

Mr. Brett: Section 15.

Q. In fixing your acreage value, then, for the section just north of Section 14, which contains the El Mirador Hotel, a number of new hotels along Indian Avenue, properties such as Harold Lloyd's property and Charles Farrell's home, you took the over-all assessment of the lands and improvements, lumped them together and then figured an average acreage value? A. Yes, sir.

Q. Mr. Gallagher, in your report as to the acreage in Section 26 you determined that that 10 acres and 20 acres which was, I believe—let me get the numbers—which you have shown on your report, on page 22, Mr. Gallagher, if you refer to it, as Parcels E and G? A. Yes, sir.

Q. Now, you have arrived at a conclusion that those [88] 30 acres had a fair market value as of today of \$12,000 per acre? A. Yes, sir.

Q. Now, let me ask you: Did you find in your entire research in this area in any of the sections

(Testimony of Joseph A. Gallagher.)

that are shown on the respondents' map, Exhibit A, any unimproved—by that I mean no dwellings or other type of improvements on it—30-acre parcel or 20-acre parcel or 10-acre parcel which was sold in either of those three units for \$12,000 an acre?

A. Yes; I believe I did.

Q. Can you tell us where you found it and what parcel it is and the size of it?

A. There are so many parcels that I have there that just an individual parcel is not coming to me. However, if Lot 7, Block 2 in the Winterhaven Manor tract—no; that was a sale. I beg your pardon.

Q. Mr. Gallagher, maybe I have not made myself clear, but I want to make myself clear so as to be fair to you. I am not asking whether you found any separate lots or one or two lots which sold at an average price as far as the lot is concerned for computing in that acreage. What I want to know is did you find any vacant acreage, not improved, that was either in a total amount of 10 acres as a unit or a total amount of 20 acres as a unit, or in a [89] total amount of 30 acres as a unit which, in one sale, brought \$12,000 per acre?

A. I do not believe I can answer that question, Mr. Brett. I know I found some of those lots, but I cannot just at this time point out the exact location of those lots without making a little study of it. But there are some on that map that are similar in valuation to the \$12,000 value that I put on that particular acreage.

(Testimony of Joseph A. Gallagher.)

Q. And had that much acreage as a unit?

A. I believe so.

Mr. Brett: May I request, if the court please, that after the witness leaves the stand, if he can find any such this morning and from his record, that he supply them so that we could have it?

The Court: You may. But I would remind counsel, again, that this is not a condemnation action. We are spending a lot of time here on something that does not help this court. It may help some other court.

Mr. Brett: Well, I realize that and I am not going to take but just a little bit more time. I had that condemnation in mind, but I feel, your Honor, in fixing value one of the elements is to be able to find something that is either sold in such an acreage or that approaches it. I do not think that we find anything anywheres near that anywhere. [90]

The Court: That may all go to the weight and you can urge it in argument. I appreciate the temptation to cross examine this witness in extenso. If this were a common condemnation action I would not make any remarks about it at all.

Mr. Brett: I see. Well, the thought that I had in mind——

The Court: I have no intention of fixing the value of this property at a precise figure.

Mr. Brett: Oh, I see. Well, I did not realize that.

The Court: The most I have in mind finding—and if I do conclude that I must find specifically, I will re-open the matter, if necessary—but the most

(Testimony of Joseph A. Gallagher.)

I intend finding is that the value is in a range.

Mr. Brett: I see.

The Court: Approximately.

Mr. Brett: May I have just the privilege of making this statement? The thought I had in mind is this, your Honor: As Mr. Clark brought out in his opening statement and also through the witness, the witness' own conception had made a wide range of study. His report does not disclose the facts that I am asking here, and I want to find out if in this compendium of study he did find any transaction which has direct relation to the conclusion that he has reached.

The Court: He has in effect said that he has not, as [91] far as he knows.

Mr. Brett: That is right. And, of course, I am stopping as soon as he has said that he has not. Then I want to ask him on a couple of other values and then I will stop as far as that is concerned.

Q. Now, Mr. Gallagher, as to the 10-acre parcel just immediately to the east of the 10-acre parcel which was your No. E, and the 40-acre parcel which is immediately east to the 20-acre parcel which was your No. G, you have placed a valuation as your estimate of the fair value of \$9,500 per acre.

A. That is right.

Q. In your entire study were you able to find any unimproved land which lies within the area that is illustrated on Respondents' Exhibit A, either as a 10-acre parcel or as a 40-acre parcel or as a 50-

(Testimony of Joseph A. Gallagher.)

acre parcel, that is, in either of those three units, which was sold at the rate of \$9,500 per acre?

A. I have found acreage listed for more than \$9,500 an acre several miles east of Section 26 out near Mirage tract.

Q. And in what unit?

A. Well, there is a 160-acre parcel there that is owned by one of the executives of the Bendix Manufacturing Company. [92]

Q. Have you found any sales at any such prices of any units in the size that I have just described?

A. My answer is yes. Culver Nichols had some acreage in Section 11, I believe it is Block 69 in Section 11. That is north of Section 14. He submitted that acreage to me for \$6,500 an acre. He thought maybe Mr. Hope might be interested——

The Court: Do not go into all of that, Mr. Gallagher. Did it sell for that or not?

The Witness: No. My client would not buy it.

The Court: Are you about finished?

Mr. Brett: I have just one more question and this is the close.

Q. Mr. Gallagher, in your computations as to average per acre, if you will look at page 19, you will find that as to Section 23 your value per acre average is fixed at \$29,000; is that not correct?

A. Yes, sir.

Q. That is cited in relation to your computations respecting the small parcels that are in Section 14, is that not true? A. Yes, sir.

(Testimony of Joseph A. Gallagher.)

Q. Now, if you will examine your report on page 22? A. I have it. [93]

Q. Do you find that? A. Yes, sir.

Q. You state up above that, in fixing the valuation of the larger parcels, which are the major portion of your total values that are in Section 26, you likewise considered the average value of Section 23 as one of the surrounding sections, and in that instance you fix the average value, instead of \$29,000, at \$33,000; is that not correct?

A. Yes, sir. I predicated that upon the sales in the south half of Section 23 and listings which were in excess of sales, and listings in the north half of Section 23, which was the reason for the differential between the \$29,000 and the \$33,000. The comparables in sales on the exhibit map will indicate that.

Q. In other words, then, depending on which section that you were applying it to, you arrived at the value in your computation?

A. I do not quite understand that question.

Mr. Brett: I will withdraw it. That is all.

Mr. Taheny: Your Honor, might I ask one or two questions.

The Court: We will call the 10:00 o'clock calendar first, Mr. Taheny.

(Interruption for other court proceedings.)

The Court: All right, Mr. Taheny.

Mr. Taheny: Your Honor, in view of the court's remarks, [94] I realize that there is no necessity for cross examination of this witness, but there is one part of your Honor's remarks that I did not

(Testimony of Joseph A. Gallagher.)

understand. I think you said or you mentioned that you intended to deal in a range or some such word. That is beyond me.

The Court: I said I did not intend to bind or attempt to bind these parties by an adjudication of the precise present value of this land.

Mr. Taheny: That is what I understood.

The Court: I do not see that it is necessary. I may be in error in that. If counsel think I am, I will hear from you.

Mr. Taheny: No; I do not disagree with that, but you used an expression I did not quite understand.

The Court: I said, "range". I said that if I make a finding as to the value of the land, it will be within a range. I may find its approximate value between X dollars and Y dollars.

Mr. Taheny: I understand.

The Court: If I have to make some finding with respect to approximate value. I do not see any necessity of making a finding as to the precise value.

Mr. Taheny: Your Honor, I would like to ask just one or two questions.

The Court: Haven't you read his report? [95]

Mr. Taheny: I have read his report, yes.

The Court: You know what value he has placed.

Mr. Taheny: I would like to know what he means by this. [96]

Cross Examination

By Mr. Taheny:

Q. In your report you place a value of \$1,047,000

(Testimony of Joseph A. Gallagher.)

on this property, but you qualify it in respect to the condition of title, do you not?

A. Yes, sir.

Q. That is, your valuation, is it of the land in the trust patent condition?

A. I assume the title is vested in Lee Arenas under trust patents issued in accordance with the final judgments of the United States District Court at Los Angeles.

Q. What would be your value if it were in fee simple?

A. In fee simple would be the same.

Mr. Taheny: That is all.

The Court: If you assumed, Mr. Gallagher, that this property was held under a trust patent until 1952, in May, which would preclude Lee Arenas from encumbering it or hypothecating it——

The Witness: I assumed that.

The Court: ——or transferring it in any way, and would preclude the attempted purchaser from having any control over the operation of the property, that being in the Department of the Interior, would that affect the opinion you have given?

A. No, sir. [97]

The Court: If you assumed that the title to the property was so placed and was conditioned, and that the President of the United States had the power to extend indefinitely the period of that trust patent, and hence extend indefinitely the restrictions upon alienation, incumbrance, and upon operation, would your opinion be affected by that?

(Testimony of Joseph A. Gallagher.)

The Witness: Yes, it would, your Honor.

The Court: To what extent?

The Witness: Well, I assume this—to what extent? It would alter the valuation, in my opinion.

The Court: To what extent?

The Witness: Possibly 40 per cent. Now, if I may——

The Court: Decrease it approximately 40 per cent?

The Witness: Decrease it.

The Court: Would that be true if you assumed the President had the power to extend that trust limitation which I have described for a period of 10 years?

The Witness: I would say yes.

The Court: Would it be the same if you assumed a longer period, say, 25 years?

The Witness: Yes.

The Court: Any further questions, gentlemen?

Mr. Preston: I think not.

Mr. Brett: Your Honor, pardon me. I want to say this [98] simply because I realize that I committed an error. I said, your Honor, I would interrogate on those matters, and then I got concerned and did not. And I would like to apologize for making a representation I did not carry out, but your Honor has examined, so it is all right.

The Court: I assumed by my pressure upon you that you had overlooked it.

Mr. Brett: I would either like to ask, myself, or have your Honor ask if the witness would be of the

(Testimony of Joseph A. Gallagher.)

same opinion if he also assumed that during the period of this restriction the property not only could not be sold, but no one could borrow on the property or otherwise encumber it for the purpose of improving it, because that limitation also exists as part of the limitation.

The Court: Did you so assume in giving your answer?

The Witness: I did.

The Court: I intended to cover the restrictions, the alienation and question of supervision, and also the restrictions upon the use of the property and operation of the property.

Mr. Brett: I realized as a lawyer that you did, and I was not sure that the witness so understood it or that the record so showed.

The Court: He is an expert. Did you so understand, Mr. Gallagher? [99]

The Witness: I did, your Honor.

Mr. Preston: If the court please, may I offer a word of explanation? We have proceeded upon the theory that the contracts in this case contemplate a valuation of the property free from any restriction, and that is the reason that we have put forth this particular testimony, on the theory that is a valuation of the property free from restrictions. That is our interpretation of the contract.

The Court: Do the petitioners contend, Judge Preston, that it will be necessary for the court to find out the precise value of this property?

Mr. Preston: Well, we have sat here thinking,

(Testimony of Joseph A. Gallagher.)

your Honor, and I have been puzzling ever since court adjourned yesterday. I figure that, from your statement, the court must have in mind fixing a percentage of the property.

The Court: As I understand petitioners' contention, it is that they are entitled to a legal fee based upon the quantum meruit of the determination of the value of their services, and then the rest of it would be—that can be determined either dollarwise or percentagewise.

Mr. Preston: From what you said yesterday I had concluded that you had thought of percentage.

The Court: That is what I intended to convey.

Mr. Preston: That would require a partition of the lands between the petitioners and Lee Arenas; and I have no [100] objection to that kind of a determination of the case if it is found proper to do so. But I want it understood that our valuations, as we take them, are to be placed upon the land as though it were absolutely unrestricted, because this court is not bound by any restriction that the Government may have upon this land.

The Court: You mean as of this time?

Mr. Preston: That is right; in the fixation of these fees the court is not bound by the restrictions. The restrictions are in effect waived or non-existent. When the court, sitting as a court of equity in this case, fixes these fees and fixes the method of their collection, that is an equitable trust under the Anglin and Stevenson cases, and I think they are undoubtedly sound. Because this fee arises, this

(Testimony of Joseph A. Gallagher.)

claim arises because of the failure of the Government to do its duty and this Indian was thrown on the country to find a lawyer or lawyers. He has found them and the Government is bound by what this court does, and the restrictions on this land haven't a thing in the world to do with the collection of their fee.

Upon fixing it, you can, of course, go into these matters if you like, but as for collection of this fee, there are no restrictions on this land, is our contention, and we think that it is amply borne out.

The Court: The thought I intended to convey was this: [101] As I view it, assuming an award is to be made, it would be manifestly unwise to lay upon this property a fixed sum of money in view of the type of property it is and the uncertainties as to what disposition may be able to be made of it in the future.

Mr. Gallagher, in your opinion, would the values you have given us apply to, say, May of 1952; would they be at least that much?

The Witness: I think the values in 1952, your Honor, may be somewhat less than they are in 1948. I believe we are running into a sort of a leveling in real estate values.

The Court: Would you be able to express an opinion percentagewise as to how much of a decrease, in your opinion, would occur between now and May 9, 1952 in the fair market value of this property?

(Testimony of Joseph A. Gallagher.)

The Witness: I do not think it will exceed 28 per cent less in 1952 than it is today.

The Court: You are referring, of course, to the Lee Arenas property?

The Witness: Yes.

Judge Preston: 20 per cent or 28 per cent?

The Witness: 28 per cent.

Mr. Brett: If your Honor please, I am mindful of the fact if we establish the rule in this case at the commencement of the case or thereabouts, that if one counsel who [102] represents the respondents made some statement or drew some conclusion, that the other was bound unless he expresses the fact that he did not agree.

You asked Mr. Taheny whether it was agreeable to the Government that the property not be valued, but that you merely fix a general range and then fix fees upon that basis, and he said that he agreed, as I understand.

I want it understood as far as I am concerned that I do not feel that that is proper. I do not want to argue the matter, but I want to briefly state this: The Government is still contending, and at least until this case is closed, that the 10 per cent contract applies.

We hope, when we get our evidence on, to show evidence which will convince the court that the quantum meruit of the contract is void and does not apply. And secondly, I think that, as Judge Preston pointed out, necessarily in applying either it will be required that the court in some manner find and

(Testimony of Joseph A. Gallagher.)

determine what the parties meant when they referred to a percentage of the value.

The Court: Let me interrupt you, Mr. Brett.

Mr. Brett: Surely.

The Court: I do not want to keep the parties and attorneys here in this other case unnecessarily.

Mr. Brett: Surely.

The Court: Will you call the case, Mr. Clark?

(Interruption for other court proceedings.)

The Court: Mr. Brett, I interrupted you.

Mr. Brett: I shall be brief, but my thought is this: That the first contract, page 5 thereof, specifically says that:

“Said ten per centum compensation shall be upon the basis of the reasonable market value of the said property as of the date of the completion of said litigation, but in no event shall be less than the value as of the date of the signing of this agreement.”

And the second contract, if effective, according to the testimony that is in the Interrogations, was a supplement or addition thereto upon the basis that the additional problems required an additional compensation.

The Court: Isn't it your view that the February 1, 1945 agreement, which is Petitioners' Exhibit 5 here, supersedes—that Petitioners' Exhibit 7 supersedes and modifies to the extent that it is inconsistent with Exhibit 6, Petitioners' Exhibit 6, the agreement of November 20, 1940?

(Testimony of Joseph A. Gallagher.)

Mr. Brett: I believe, if the court please, that if you find that it is an effective contract, it supercedes it to this extent: That in place of fixing 10 per cent, it fixes on the quantum meruit, and otherwise I think it would have to apply to that same valuation. In other words, I do not [104] think it is a complete novation or an attempt to abandon the entire contract.

Of course, as I stated, the Government hopes to be able to establish that this document which is 7 is void and is not the controlling agreement in this case.

The Court: Perhaps I am too hasty in limiting you. We must go into this question of value, then, because apparently it might be material—not only the value as of now, but the value as of any date on which the litigation can be said to have ceased or been completed. It would also be material to know the value as of the date of the signing of Exhibit 7, the 20th of November, 1940.

Mr. Brett: I think that is true, your Honor. And I would also point out to the court that under the decisions, both of the State of California and the decisions of the Federal Court, probably the latter in this instance would control in this type of proceeding. I am referring to the Sanitary District of Chicago case which is in 149 Fed. (2d). I do not have the page reference.

The court squarely holds—and the United States Supreme Court denied certiorari—that in fixing a valuation you have to fix it in the light of the con-

(Testimony of Joseph A. Gallagher.)

ditions that exist as of the date of valuation, particularly as to both what its adaptability and its actual ability of use is at that time.

That particular case, for example, turned on the fact [105] that, although potentially certain property might be used if certain changes were made, it could not be used at that time because of existing conditions; and the trial court accepted the potential theory, on the theory that it was possible, even probable, that it could be changed, and the Circuit Court reversed and the Supreme Court sustained it.

So that I feel, in this case where the contract, if you happen to hold that the 10 per cent contract is the valid one, where it specifically says in language that the valuation is to be as of the date of the completion of litigation or as of the date of the contract, that we have to have our testimony in the light of the conditions that existed at that time, and not in the light of what might take place at some other time or under some other conditions.

The Court: We might have to have a valuation as of several different dates.

Mr. Brett: That is correct, your Honor.

Mr. Preston: I suggest this, if your Honor please: Either one of two things occur, and that is, that we either decide to try the issue now as to the validity of the second contract, or have it understood that the case may be reopened in the event the court later holds that the second contract was inclusive. In either event that would move us along.

(Testimony of Joseph A. Gallagher.)

The Court: Yes. Well, let us see if we can cover it [106] in all these periods now.

Mr. Gallagher, the opinions you have given us as to the value of this property in question as to the date of your report, December 9, 1947, would those same valuations apply, in your opinion, throughout the year 1947?

The Witness: Yes, sir.

The Court: And would apply today?

The Witness: Yes, sir.

The Court: And have you an opinion as to the value as of the 20th day of November, 1940?

Mr. Preston: We would have the right, would we not, to waive that point, because the contract provides that it be valued as of the termination of the services, but that it cannot be any less than it was in 1940. That puts 1940 in a doubtful column, because we will admit that in 1940 it was not worth as much as it is now or as much as at any time in 1947.

The Court: But the opposing expert in this proceeding puts the value way below what they, themselves, might admit it was in 1940. Conceivably it would be less, in their opinion, today than it was in 1940.

Mr. Brett: I will check. I do not think that is true, but maybe we can save time.

Mr. Preston: I think we can stipulate that the value was greater and is greater; that it was greater in 1947 and is greater now than it was in 1940. [107]

Mr. Brett: We are prepared to stipulate, if the

(Testimony of Joseph A. Gallagher.)

court please, that the value, under any form of assumption of facts, that is, whether you value it as a trust patent or a deed or otherwise, in 1940 would be less than the value as of today; so, as Judge Preston says, that eliminated that feature.

Mr. Preston: That is acceptable.

The Court: Very well.

Mr. Brett: I would, however, like the privilege of getting in there a part of the witness' answer to the court. As I understand it, your Honor asked the witness, and he did give a valuation of his conception, if you take the trust patent theory. I mean he fixed the different per cent. I was not making a note. Didn't he say it would be 40 per cent less, in his opinion?

The Court: If the President has the power to extend the existing trust patent by as much as 10 years, I understood Mr. Gallagher to state in his opinion that would depreciate the value to the extent of 40 per cent. Is that correct?

The Witness: Yes, sir.

Mr. Taheny: Your Honor, the remarks of Mr. Brett, I believe, called for a statement of the position of the undersigned as the personal counsel for Mr. Arenas. In his answer Mr. Brett denies the execution of the 1940 contract by Mr. [108] Arenas. Mr. Arenas is here to testify that there was a contract for 10 per cent, as far as Mr. Arenas personally is concerned, and he does not challenge the legality in any way of the 1940 contract for 10 per cent.

(Testimony of Joseph A. Gallagher.)

The Court: He does challenge the validity of the subsequent agreement on February 1, 1945, Petitioners' Exhibit 7.

Mr. Taheny: Yes; he denies that. He denies the validity of the 1945 agreement; and I would like to have understood, your Honor, that Mr. Arenas personally takes that position in this trial.

The Court: Any further questions of Mr. Gallagher?

Mr. Clark: We have none, your Honor.

Mr. Preston: Yes, we have.

Mr. Brett: Respondents haven't any further questions.

The Court: You may step down.

The Witness: Thank you, your Honor.

The Court: Petitioners' next witness.

Mr. Clark: Just a moment, your Honor. Judge Preston has a question.

Mr. Preston: Just one question.

Q. (By Mr. Clark): Mr. Gallagher, in your opinion, is the land here involved situated in section 26 susceptible of independent development economically for the purposes for which you have testified?

A. In my opinion—— [109]

Mr. Brett: To which we object as neither part of the redirect nor as proper direct examination.

The Court: Overruled.

A. In my opinion, it is susceptible to future development. It has a 90-acre parcel there. 90 acres are ample for subdivision development or development of any particular subdivision nature.

(Testimony of Joseph A. Gallagher.)

Mr. Clark: That is all. May we call Benton Beckley, your Honor, as the next witness. [110]

(Page 158, line 19, to page 168, line 19):

BENTON BECKLEY

called as a witness by Petitioners, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Benton Beckley.

The Clerk: Spell your last name, please.

The Witness: B-e-c-k-l-e-y.

Direct Examination

By Mr. Clark:

Q. Where do you live, Mr. Beckley?

A. I live in the City of Palm Springs.

Q. How long have you resided there?

A. For the past 11 years.

Q. In what business are you engaged?

A. In the real estate business.

Q. Are you licensed as a realtor under the laws of the State of California? A. Yes, sir.

Q. How long have you held such a license?

A. The past four years.

Q. Are you the owner of any real property situated in Palm Springs? A. Yes, sir.

Q. Where is it located and what is its type?

A. It is located in the center of the section of both these pieces that Lee Arenas owns.

Q. And on what street or streets?

A. It is on State Highway, the south part of Palm Canyon.

(Testimony of Benton Beckley.)

Q. And what type of property is it?

A. It is C-2 business property.

Q. Is it improved for that use?

A. It is improved for that use.

Q. Did you purchase that property?

A. I purchased it two or three years ago.

Q. And have you in the practice of your profession kept in touch with sales and listings of properties within the Palm Springs area?

A. Yes, sir.

Q. How frequently have you made sales of properties within that area?

A. Well, we made two or three sales at least every month, and more.

Q. That has been true throughout the period of your holding a license as a realtor in California?

A. Yes, sir.

Q. And what types of properties have been involved in those sales?

A. All types of property, both Indian and Public [112] owned properties.

Q. Have you also informed yourself during that period of time as to the asking prices of properties within that area? A. Yes; I have.

Q. Are you familiar with the properties involved here, situated in sections 14 and 26?

A. Yes, sir.

Q. And have you been familiar with those properties throughout the period of your residence in Palm Springs? A. Yes, sir.

Q. Have you had anything to do with the sale or

(Testimony of Benton Beckley.)

listings of properties owned by white persons comparable in location and in condition and in utility to these particular properties? A. Yes, sir.

Q. Have you collaborated with Mr. Joseph A. Gallagher in the preparation of his report, Exhibit 14 in evidence here? A. I did.

Q. You have seen it, examined that report since its completion on the 9th day of December last?

A. Not the completion folder, but I have worked with him in Palm Springs on acquiring what he has in his subject matter.

Q. Have you formed an opinion as to the reasonable [113] market value of the land so involved here situated in section 14, comprising four acres?

A. I have.

Q. What, in your opinion, on the 27th day of August, 1947 was the reasonable market value of those lands?

A. I believe the figure that he did set, close to a million dollars, would be very accurate, sir, at to-day's value.

Q. That is in Section 26, too?

A. Yes, sir.

Q. Is that based upon your study and your experience as a realtor in that area and owner of property there?

A. That is right, according to the location.

Mr. Clark: Cross examine.

The Court: You have heard the testimony of Mr. Gallagher?

The Witness: Practically all except the first day,

(Testimony of Benton Beckley.)

your Honor. I was not here. I was absent the first part of it.

The Court: Did you hear his expression of opinion of the effect of the trust patent?

The Witness: That is right, your Honor.

The Court: Would your opinion be the same?

The Witness: The same.

The Court: You heard all the testimony he gave this [114] morning?

The Witness: Yes, sir; practically all, the first part.

The Court: Your opinion coincides with his given here this morning?

The Witness: That is right, your Honor.

The Court: And the opinion you have given applies to all of the year 1947?

The Witness: That is right.

The Court: That is all I have.

Cross Examination

By Mr. Brett:

Q. Mr. Beckley, in arriving at your conclusion did you use the same method of approach that has been described by Mr. Gallagher?

A. Approximately the same approach, by the sale of property adjoining this property in the Palm Springs area and the location of it.

Q. Did you specifically ascertain the assessed valuations of the properties on each of the white owned sections that surround section 14?

A. I did.

(Testimony of Benton Beckley.)

Q. Taking the bulk assessment of the property and improvements, and from that, by applying a mathematical percentage, ascertaining that the assessment was approximately one-fifth of the market value, arrived at an average value per acre of each section? [115]

A. I arrived at the value of a piece of ground by the actual sale price at the time. Two years from now the sale price might be lower or might be more.

The Court: Please answer the question. The question is: Did you use the assessed value of the surrounding property in the same manner?

The Witness: That is right.

The Court: That Mr. Gallagher described here this morning?

The Witness: That is right.

Q. (By Mr. Brett): After obtaining a conclusion as to the average acreage value in each of the white owned sections that surrounded the Indian owned sections, you applied that average to the Indian owned sections? A. Yes, sir.

Q. Did you as a part of your conception in fixing this million dollar overall value assume that a portion or all the Indian lands would have utility for business purposes?

A. This particular land here, Mr. Brett, I do not think can be classified as all the surrounding property on the other side of this pink line, you see, where the wind section is. All of the area of his land lays in a section that can't be replaced, and, as wants have gone on in Palm Springs, has in-

(Testimony of Benton Beckley.)

creased in value from 10 to 20 per cent every year from 1936. [116]

Mr. Brett: Just a minute. I move to strike that as not responsive, and it is not in any way responsive as an answer to my question. May I have the question read, please?

The Court: Read it, please, Mr. Reporter.

(Question and answer read by the reporter.)

The Court: The answer may stand. Motion denied.

The Witness: As a preliminary, I would like to tell Mr. Brett he is trying to classify this property with the outlying property in Palm Springs, and the prices vary according to the locations of the property.

The Court: The question was: What did you do—please read it, Mr. Reporter.

(Question again read by the reporter.)

A. Yes, sir.

Q. (By Mr. Brett): That is, you assumed that a portion of the Arenas lands which are shown on the Respondents' Exhibit A as being Lots 46 and 47 in Section 14, and as shown as 6 separate units in Section 26 would have adaptability for use and could be used for business purposes?

A. Yes, sir.

Q. Under C-2?

A. C-2 and trailers, and C-3, manufacturing, M-1—any of those classifications.

The Court: Any further questions?

(Testimony of Benton Beckley.)

Mr. Brett: I would like to ask him the same questions [117] generally, the two questions that I asked Mr. Gallagher.

Q. In taking your overall figure did you assume that the market value of parcels 46 and 47 in Section 14 were at the rate of \$20,000 per acre?

A. Yes, sir.

Q. And in connection with the lands that are in Section 26 did you assume that the 10 and 20-acre parcels which are just immediately east of Lots 39 and 40 had a market value of \$12,000 per acre?

A. Yes, sir; or more.

Q. And that the 10- and 40-acre pieces which are immediately east of those parcels had a value of \$9500 an acre? A. More than 9500.

Q. Do you know from your experience as a realtor in Palm Springs of any unimproved lots that are within the areas that are shown on Respondents' Exhibit A which were sold in units of either 10 or 20 or 30 acres, that is, the single unit of either of those three amounts, and were unimproved, and were sold for \$12,000 an acre?

A. Within three miles of town there is a steak house and it was an acre and a quarter, sold for \$42,000. Across the street from——

Mr. Brett: Pardon me just a minute. It is quite apparent that you have not understood the question. [118]

The Witness: Unimproved; I realized that.

Q. In the first place, that is improved; in the second place, it is much less than 10 acres. Now, my

(Testimony of Benton Beckley.)

question is this—and this is all I want to know: Do you know of any sale in the Palm Springs area that is shown on the Respondents' Exhibit A of either 10 acres as one unit, or 20 acres as one unit, or 30 acres as one unit at a price of \$12,000 per acre?

A. I don't know of any you could buy at that. McManus owns——

The Court: Do you know of any that were sold at that price? That is the question.

Mr. Brett: And which are unimproved?

A. It has all been broken down into subdivisions.

The Court: Then your answer is "no"?

The Witness: "No"; that is right.

The Court: You do not know of any units that large?

The Witness: No, sir.

Mr. Brett: Now, then, one other question.

Q. Do you know of any lands in the area that I have just described that were sold in units of either 10 acres or 40 acres or 50 acres, in that size units, that were unimproved——

A. There is one point here, Mr. Brett——

The Court: Let the question be finished. [119]

The Witness: This property of Lee Arenas' has water on it, which can't be classified as unimproved, is that right?

The Court: Have you finished your question, Mr. Brett?

Mr. Brett: I have not finished my question.

The Court: Read it, please, Mr. Reporter.

Mr. Brett: But I am perfectly willing to add the

(Testimony of Benton Beckley.)

factor that there is water available. By improvements I mean some form of structure or improvement upon the land or the emplacement of streets, etc.

Q. Do you know of any parcels in that area that is shown on Respondents' Exhibit A that were sold in units of either 10 acres or 40 acres or 50 acres, as a unit, at a price of \$9500 per acre?

A. Five acres is the largest parcel that has been available for sale, and it is available today at \$35,000, five acres.

Q. My question was: Do you know of any being sold at those prices?

A. There hasn't been any on the market to be bought, Mr. Brett.

The Court: Then your answer is "no"?

Q. (By Mr. Brett): Then your answer is "no"?

A. "No."

Mr. Brett: That is all.

The Court: Any further questions: You may step down, Mr. Beckley. [120]

(Page 358, line 16, to page 360, line 1):

The Court: What further is there, Mr. Brett?

Mr. Brett: Before the respondents close, your Honor, I have prepared in writing and I now hand counsel two copies, and I hand the clerk an original—and I hope it is the top carbon copy for the court; I certainly tried to obtain it—of the Government's motion to strike the testimony of the witnesses Joseph A. Gallagher, Sr., and Benton Beckley as to the opinions of value expressed by them, not the rest of their testimony.

The motion is detailed and there is annexed to it the points and authorities, and then annexed to it quotations from the points and authorities for counsel. And I should like at this time to file the motion and I should like to have leave for some time to be fixed by your Honor to have the opportunity of arguing the motions. I realize that I can't do it today and I assume that counsel will probably want to make some reply and give citations.

The Court: Is it noticed for hearing?

Mr. Brett: No; I have not. It is not a matter to be noticed for hearing, because it would occur ordinarily in the course of the trial, but I prepared it in this form by reason of our time limitations.

The Court: Very well. Is there any further testimony?

Mr. Brett: No, your Honor.

The Court: Any further evidence to be offered by petitioners or respondents? [121]

Mr. Brett: Respondents have no more, your Honor.

The Court: Do both sides rest?

Mr. Preston: I will tell you, your Honor, I think we rest, but I want about 10 minutes' argument and I would rather not say I am absolutely through until the day of the argument, if the court wants to fix a time for that.

The Court: Very well. Then I will continue the hearing until a day certain, gentlemen, and then at that time I will hear any further testimony and motions to strike, and any further argument. How much time do you think will be necessary? [122]

(Page 402, line 20, to page 412, line 5):

Mr. Brett: If the court please, I don't want to interrupt this statement that Judge Preston is about to make, because we are all interested in that issue. I did want to point out that the case is not closed from the standpoint of submission until we have a ruling upon the motion to strike that the government filed. They filed it some time ago.

The Court: Yes, I am ready to rule upon that at any time. Perhaps we had better rule upon it now.

Is there any further evidence, gentlemen?

Mr. Preston: Not that I know of.

The Court: Then all sides rest, and the evidence is closed again.

Do you wish to argue it, Mr. Brett?

Mr. Brett: I did, your Honor, but I will abide by your desires.

The Court: Do your objections go to the weight of it?

Mr. Brett: No, I don't think so. I think they go directly to the fact that it is improper matter.

Mr. Preston: The expert witnesses?

Mr. Brett: I have made a motion in writing to strike the conclusions, the value as stated by Mr. Gallagher, upon the ground that he has used as a part of his evidence, by his own statement, assessed values.

I might say that probably the best example of that would be the exhibit which was introduced in evidence as [123] Petitioners' Exhibit 14-A, and which is replete with numbered designated portions, list-

ings, or sales, on which it says that the basis of the value is the assessed value.

The Court: Isn't that only one of the bases?

Mr. Brett: I don't think so.

The Court: He was asked his reasons and he was cross examined. He wasn't asked his reasons, I take it, but he was cross examined on the question.

Mr. Brett: He was cross examined on the——

The Court: He said that is one of his defenses of his opinion.

Mr. Brett: I don't think it is in this report for this reason——

The Court: Can we go so far as to say that he testified that the sole basis for his opinion was some formula based upon the assessed value?

Mr. Brett: I think so, because he not only so stated, but he states so elsewhere in his report, which was adopted as part of his opinion.

I call your attention to the fact that in evaluating both of these areas he evaluated them in certain sections, that is, Section 14 and Section 26, as to acreage, and he specifically stated—pardon me just one moment—on page 11 of his report—page 19 of his report, your Honor—and then I cross examined him and he adhered to it, and so did [124] the other witness whose testimony is attacked, that he used the same methods. He says on page 19:

“I have averaged acreage value in Section 11, 23, 13 and 15, which sections are located north, south, east and west respectively, and have arrived at what in my opinion is the fair market acreage value of

land in Section 14, the subject-matter of this appraisal."

Then he gets a value which he admitted was arrived at by taking both improved and unimproved properties, and the assessed value of them as units, and I specifically asked him that question, and he answered yes.

The Court: Well, suppose a witness comes in and he says, "Now, I think in my opinion the property is worth X dollars," and he is taken over on cross examination, "Why do you think so?" "To show you one reason why my opinion is sound, I will take the opinion of the tax assessor, and by a formula which is often applied I will prove to you that it coincides actually or substantially with my opinion." Would that render his opinion incompetent?

Mr. Brett: In my opinion under the law it would. He went further.

The Court: What is the legal objection to basing the opinion upon the tax assessment? It is because it is an opinion based upon an opinion, isn't it?

Mr. Brett: Because it is an opinion based upon something which in itself is incompetent.

In other words, if a thing is incompetent, the fact that you use a formula to multiply it by another figure doesn't make it any less incompetent.

The Court: It is incompetent because it is a mere opinion of the tax assessor, isn't it, who is not called as a witness?

Mr. Brett: That is right.

The Court: And not subjected to cross examination.

Before I would strike a witness' testimony, he would have to say to me that "That is all I base it upon, that is the only thing I have to go on, I take the assessor's opinion and I multiply it by two, three, four, five, something like that," then I would strike it.

Mr. Brett: Your Honor, will you bear with me just one moment, because I know we have had a long time——

The Court: It isn't a question of time. If there was any doubt in my mind I would hear you extensively.

Mr. Brett: It goes a little further in this case. I think that would be incompetent, and I think my motion would be good, but this is a much worse case, because this is what he says in his report in the exhibits and directly on cross examination. He went further than that. He says that the ultimate, only basis which he used to get this acreage value [126] was this. He found there were four sections that surrounded it, he took each section and he got assessed values, and let's say he got other values, because he said he did, some of which were unimproved properties, some of which were improved property, and he obtained a unit value of improved and unimproved property throughout this section, then by taking the acreage in that section he arrived—in other words, the section, of course, has so many acres, 640 acres—by taking that lump gruel, or hash, if it is not an improper word, he divides it

by 640 and he arrives at an acreage value for that section, say, to the right of this section. He uses the same process on all four sections, then he divides by the four sections, and that is the way that he gets a value of an unimproved Indian section which is restricted.

That method is thoroughly incompetent, and that is the only method he used by his own testimony.

I don't say that some of the ingredients that he used, threw into the pot, were not properly arrived at, I couldn't say that.

The Court: Doesn't that all go to the weight?

Mr. Brett: I don't think so.

The Court: Once he is qualified, once he is shown qualified to express an opinion, and he expresses that opinion, that is the evidence, isn't it, and cross examination goes to the weight of it? [127]

You might put the best real estate man in the world on the stand, and he expresses an opinion as to value, and on cross examination he might say, "Well, I will tell you what I do, I go through all these things that real estate men usually go through, then if I have any doubts I take a little astrology to resolve my doubts, I do this, or I depend on some other element of chance between this figure and that figure, that is how close it is with me sometimes, but still that is my opinion," could you strike it?

Mr. Brett: On the last example you made I think those were competent elements. The other is not. I didn't understand anything you used was incompetent. I understood you to say that he got certain data, he got certain information from others, and

then he adjusted it, based it on experience, based it on something else, or whatever method he used.

The Court: Suppose he says to you, "I can't tell you how I arrived at it, I couldn't begin to tell you all the things that go into my determination," wouldn't that go to the weight of his testimony?

Mr. Brett: I think that would go to the weight.

The Court: If you said to him, "Well, do you use assessed value?" "Yes, I consider assessed value."

Mr. Brett: That isn't all. If he said only that, I think probably even though I think that would be fallacious on his part, probably it would be overweighed by the other [128] matter. But he went further on that.

The Court: In order to strike it, must you not be able to say that he predicated his opinion solely upon that?

Mr. Preston: That is San Diego against Neale.

Mr. Brett: Did your Honor read the memorandum that I attached there?

The Court: Yes.

Mr. Brett: The Supreme Court hasn't said so. The Supreme Court says specifically this language: " * * * but we think that when a witness bases his opinion entirely upon incompetent and inadmissible matters, or shows that such matters are the chief elements in the calculations which lead him to such conclusions"—

He showed clearly that they were chief elements.

The Court: That goes to the weight of his testimony.

Mr. Brett: The court says it should be stricken.

There is one other thing that is equally important. The assessment is only one. The other point is equally important. That is evidenced by this Long Beach School District case in 30 A.C.

This man by his own testimony and by his report, which was a part of his testimony, shows that he was taking values based upon business properties which are along the principal street of the City of Palm Springs, he was taking values of dude ranches, and so forth, and huge hotels, and applying [129] them as a part of his considerations in fixing value of an area which at the time and at the present, and so far as anyone here can determine is still restricted to what in effect is a 30-day permit.

The Court: But that goes to the weight of it.

Mr. Brett: Your Honor, you can't fix a value——

The Court: You can say he disregarded the zoning ordinances, you can say he disregarded the restrictions, you can say he disregarded a great many other things, but that all goes to the weight, doesn't it?

Mr. Brett: I don't think so. I think, if your Honor please, that if you would give a value for a use which is prohibited by law, or a use which by the nature of the circumstances of the case couldn't be used—for instance, if you are going to put it for mining value and there were no minerals, and it was demonstrated as such, or if the law prohibits such a use, not only now but as far as you can see into the immediate future, then it seems to me that you have an incompetent matter. He is on the horn of two dilemmas in his opinion.

The Court: It all goes to the weight, Mr. Brett. Suppose you had a case where there is a question of whether it was mineral land or not, and the plaintiff claimed it was, and brought in experts and propounded to them hypothetical questions, assume this land contains minerals; the defendant [130] brings in experts and propounds a question that doesn't mention minerals; on cross examination the attorney for the plaintiff says, "Well, Mr. So-and-so, did you consider that this was mineral-bearing land?" "No, no one ever suggested that to me, it looks just like land to me." "Then you didn't consider that in your computation or in arriving at your opinion?" "No."—would you move to strike his testimony?

Mr. Brett: No, because that would be admissible. Here is the distinction. This man himself admits and introduced in evidence, as far as the use by anyone other than Indians, the use law which was then existent, and which would prohibit any of the uses which he had. This whole area if it went into white hands as it stands now, insofar as anyone can tell at the present time, is restricted so it couldn't be used in the manner in which he evaluated it. If you take it from the standpoint of its present governmental restrictions it is even more limited. So there was no dispute as to the facts.

Your example, of course, then raised an issue of fact. Of course, he can value it on any theory where there is an issue of fact. I would say, however, if you would change your example a little bit, if both parties stipulated in advance that the land was non-

mineral-bearing, and then a witness announced that the basis of his opinion, either in whole or in part, was its mineral value, I would say then it could [131] be stricken as incompetent and wouldn't go to the weight, because it wouldn't have such value. This doesn't have such value. This land could not be used for the uses for which this man evaluated it, either under the existing restrictions or under the restrictions of the City of Palm Springs, if it was put into white ownership.

The Court: It seems to me those considerations all go to the weight, Mr. Brett. The motion to strike the testimony of witnesses Joseph A. Gallagher, Sr., and Benton Beckley is denied. [132]

[Endorsed]: Filed Aug. 7, 1951.

[Title of District Court and Cause.]

Los Angeles, California,

Monday, March 29, 1948. 1:45 p.m.

The Clerk: No. 1321-O'C, Lee Arenas v. United States, further hearing on return of order of October 24, 1947 to show cause why attorneys' fees and expenses should not be allowed.

Mr. Brett: Ready for the United States.

Mr. Taheny: Ready for Mr. Arenas.

Mr. Preston: May I be allowed to address the court for just a few minutes on the law points?

The Court: Yes, I would like to hear from the petitioners on this contract question, their view of the relation between the contract of November 20,

1940, between Arenas and Sallee, and the subsequent agreement, the power of attorney and contract executed by Arenas in favor of Sallee, Preston and Clark.

Mr. Preston: I was thinking that might be of some value. I spent the forenoon on that subject, and I have a couple of memoranda that I would like to hand to the court.

The Court: Very well.

Mr. Taheny: Your Honor, can I say this? I have a letter sent by Mr. Sallee which I would like to have added to this record. It was given to me by my clients. At the hearing we held a few weeks ago, Mrs. Arenas remembered the letter and she has found this. I believe she will be here in a little [401] while.

The Court: Have you shown it to the petitioners?

Mr. Taheny: I showed them copies of it.

My clients have just come into court now, your Honor.

The Court: The motion is to reopen the evidence on behalf of Lee Arenas and introduce a letter.

Mr. Taheny: That is right.

The Court: Is there any objection to it?

Mr. Preston: I haven't any.

The Court: The evidence is reopened for that purpose. It will be stipulated that the letter in question was written by Mr. Sallee on or about the date it bears and sent in the regular course of mail to the person to whom it is addressed?

Mr. Clark: Yes, your Honor.

Mr. Taheny: Yes, your Honor, and received by them.

Mr. Clark: And received in the course of mail.

The Court: Very well. The document is received in evidence and it will be marked——

The Clerk: Respondent's N.

[Printer's Note: Exhibit N is set out at page 359 of this printed record.]

Mr. Brett: If the court please, I don't want to interrupt this statement that Judge Preston is about to make, because we are all interested in that issue. I did want to point out that the case is not closed from the standpoint of submission until we have a ruling upon the motion to strike that the government filed. They filed it some time ago. [402]

The Court: Yes, I am ready to rule upon that at any time. Perhaps we had better rule upon it now.

Is there any further evidence, gentlemen?

Mr. Preston: Not that I know of.

The Court: Then all sides rest, and the evidence is closed again.

Do you wish to argue it, Mr. Brett?

Mr. Brett: I did, your Honor, but I will abide by your desires.

The Court: Do your objections go to the weight of it?

Mr. Brett: No, I don't think so. I think they go directly to the fact that it is improper matter.

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Gallagher, upon the ground that he has used as a part of his evidence, by his own statement, assessed values.

I might say that probably the best example of that would be the exhibit which was introduced in evidence as Petitioner's Exhibit 14-A, and which is replete with numbered designated portions, listings, or sales, on which it says that the basis of the value is the assessed value.

The Court: Isn't that only one of the bases?

Mr. Brett: I don't think so.

The Court: He was asked his reasons and he was cross-examined. [403] He wasn't asked his reasons, I take it, but he was cross-examined on the question.

Mr. Brett: He was cross-examined on the——

The Court: He said that is one of his defenses of his opinion.

Mr. Brett: I don't think it is in this report for this reason——

The Court: Can we go so far as to say that he testified that the sole basis for his opinion was some formula based upon the assessed value?

Mr. Brett: I think so, because he not only so stated, but he states so elsewhere in his report, which was adopted as part of his opinion.

I call your attention to the fact that in evaluating both of these areas he evaluated them in certain sections, that is, Section 14 and Section 26, as to acreage, and he specifically stated—pardon me just one moment—on page 11 of his report—page 19 of his report, your Honor—and then I cross-examined him and he adhered to it, and so did the other witness

whose testimony is attacked, that he used the same methods. He says on page 19:

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Then he gets a value which he admitted was arrived at by taking both improved and unimproved properties, and the assessed value of them as units, and I specifically asked him that question, and he answered yes.

The Court: Well, suppose a witness comes in and he says, “Now, I think in my opinion the property is worth X dollars,” and he is taken over on cross examination, “Why do you think so?” “To show you one reason why my opinion is sound, I will take the opinion of the tax assessor, and by a formula which is often applied I will prove to you that it coincides actually or substantially with my opinion.” Would that render his opinion incompetent?

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The Court: What is the legal objection to basing the opinion upon the tax assessment? It is because it is an opinion based upon an opinion, isn't it?

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In other words, if a thing is incompetent, the fact that you use a formula to multiply it by another figure doesn't make it any less incompetent.

The Court: It is incompetent because it is a mere [405] opinion of the tax assessor, isn't it, who is not called as a witness?

Mr. Brett: That is right.

The Court: And not subjected to cross examination.

Before I would strike a witness' testimony, he would have to say to me that "That is all I base it upon, that is the only thing I have to go on, I take the assessor's opinion and I multiply it by two, three, four, five, something like that," then I would strike it.

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The Court: It isn't a question of time. If there was any doubt in my mind I would hear you extensively.

Mr. Brett: It goes a little further in this case. I think that would be incompetent, and I think my motion would be good, but this is a much worse case, because this is what he says in his report in the exhibits and directly on cross examination. He went further than that. He says that the ultimate, only basis which he used to get this acreage value was this. He found there were four sections that surrounded it, he took each section and he got assessed values, and let's say he got other values, because he said he did, some of which were unimproved properties, some of which were improved property, and he obtained a unit value of improved and unimproved property throughout this section, then by

taking [406] the acreage in that section he arrived—in other words, the section, of course, has so many acres, 640 acres—by taking that lump gruel, or hash, if it is not an improper word, he divides it by 640 and he arrives at an acreage value for that section, say, to the right of this section. He uses the same process on all four sections, then he divides by the four sections, and that is the way that he gets a value of an unimproved Indian section which is restricted.

That method is thoroughly incompetent, and that is the only method he used by his own testimony.

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The Court: Doesn't that all go to the weight?

Mr. Brett: I don't think so.

The Court: Once he is qualified, once he is shown qualified to express an opinion, and he expresses that opinion, that is the evidence, isn't it, and cross examination goes to the weight of it?

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Mr. Brett: On the last example you made I think

those were competent elements. The other is not. I didn't understand anything you used was incompetent. I understood you to say that he got certain data, he got certain information from others, and then he adjusted it, based it on experience, based it on something else, or whatever method he used.

The Court: Suppose he says to you, "I can't tell you how I arrived at it, I couldn't begin to tell you all the things that go into my determination," wouldn't that go to the weight of his testimony?

Mr. Brett: I think that would go to the weight.

The Court: If you said to him, "Well, do you use assessed value?" "Yes, I consider assessed value."

Mr. Brett: That isn't all. If he said only that, I think probably even though I think that would be fallacious on his part, probably it would be outweighed by the other matter. But he went further than that.

The Court: In order to strike it, must you not be able to say that he predicated his opinion solely upon that?

Mr. Preston: That is San Diego against Neale.

Mr. Brett: Did your Honor read the memorandum that I attached there? [408]

The Court: Yes.

Mr. Brett: The Supreme Court hasn't said so. The Supreme Court says specifically this language: " * * * but we think that when a witness bases his opinion entirely upon incompetent and inadmissible matters, or shows that such matters are the chief

elements in the calculations which lead him to such conclusions''——

He showed clearly that they were chief elements.

The Court: That goes to the weight of his testimony.

Mr. Brett: The court says it should be stricken.

There is one other thing that is equally important. The assessment is only one. The other point is equally important. That is evidenced by this Long Beach School District case in 30 A.C.

This man by his own testimony and by his report, which was a part of his testimony, shows that he was taking values based upon business properties which are along the principal street of the City of Palm Springs, he was taking values of dude ranches, and so forth, and huge hotels, and applying them as a part of his considerations in fixing value of an area which at the time and at the present, and so far as anyone here can determine is still restricted to what in effect is a 30-day permit.

The Court: But that goes to the weight of it.

Mr. Brett: Your Honor, you can't fix a value
—— [409]

The Court: You can say he disregarded the zoning ordinances, you can say he disregarded the restrictions, you can say he disregarded a great many other things, but that all goes to the weight, doesn't it?

Mr. Brett: I don't think so. I think, if your Honor please, that if you would give a value for a use which is prohibited by law, or a use which by the nature of the circumstances of the case couldn't

be used—for instance, if you are going to put it for mining value and there were no minerals, and it was demonstrated as such, or if the law prohibits such a use, not only now but as far as you can see into the immediate future, then it seems to me that you have an incompetent matter. He is on the horn of two dilemmas in his opinion.

The Court: It all goes to the weight, Mr. Brett. Suppose you had a case where there is a question of whether it was mineral land or not, and the plaintiff claimed it was, and brought in experts and propounded to them hypothetical questions, assume this land contains minerals; the defendant brings in experts and propounds a question that doesn't mention minerals; on cross examination the attorney for the plaintiff says, "Well, Mr. So-and-so, did you consider that this was mineral-bearing land?" "No, no one ever suggested that to me, it looks just like land to me." "Then you didn't consider that in your computation or [410] in arriving at your opinion?" "No."—would you move to strike his testimony?

Mr. Brett: No, because that would be admissible. Here is the distinction. This man himself admits and introduced in evidence, as far as the use by anyone other than Indians, the use law which was then existent, and which would prohibit any of the uses which he had. This whole area if it went into white hands as it stands now, insofar as anyone can tell at the present time, is restricted so it couldn't be used in the manner in which he evaluated it. If you take it from the standpoint of its present govern-

mental restrictions it is even more limited. So there was no dispute as to the facts.

Your example, of course, then raised an issue of fact. Of course, he can value it on any theory where there is an issue of fact. I would say, however, if you would change your example a little bit, if both parties stipulated in advance that the land was non-mineral-bearing, and then a witness announced that the basis of his opinion, either in whole or in part, was its mineral value, I would say then it could be stricken as incompetent and wouldn't go to the weight, because it wouldn't have such value. This doesn't have such value. This land could not be used for the uses for which this man evaluated it, either under the existing restrictions or under the restrictions of the City [411] of Palm Springs, if it was put into white ownership.

The Court: It seems to me those considerations all go to the weight, Mr. Brett. The motion to strike the testimony of witnesses Joseph A. Gallagher, Sr., and Benton Beckley is denied.

Mr. Preston: May it please the court, in what I have to say here today—

Mr. Brett: Pardon me just a moment. There is also a question, your Honor, whether we have to reserve exceptions, because the new rules don't apply? This is not condemnation, though, and exceptions are automatic.

The Court: You may reserve an exception to all adverse rulings.

Mr. Preston: As I was about to say, in what I am going to present to the court, I am not going to

dwell at length upon the value or the testimony concerning the value of my own services or that of the services of my associates.

The Court: Perhaps it might be helpful for me to mention to you a matter that is in my mind. The contract of November 20, 1940 provides for a 10 per cent fee to Mr. Sallee, and provides generally for representation of all of Lee Arenas' interests in connection with tribal lands, and it provides that Sallee is authorized to associate with him in said work such assistants, including attorneys, as he may select. [412]

And then over on page 5 it provides 10 per cent compensation based upon reasonable market value.

On page 6 it provides the method for payment in kind in the event the parties do not agree as to the manner in which the compensation is to be paid.

The later contract of February 1, 1945 provides a quantum meruit basis of compensation, but does not mention the earlier contract. Does the 1945 contract supersede the 1940 contract, and if so, to what extent? And if only to the extent of compensation, fixing the measure of compensation, what of the point Mr. Taheny raises in the closing portion of his brief that there is a method provided by the 1940 contract for payment in kind, and that provision is still in force and will control here, even though the later contract might be the measure of compensation?

Mr. Preston: Well, that latter point, your Honor, is the one that would have to receive some further consideration, probably, in my brief, but I had

anticipated everything you have said up to that last point, and I want to make myself clear about it.

The first point they make is that this contract, being one entered into—that is, the '45 contract—being one entered into while the relationship of attorney and client existed is presumed, they say, to be fraudulent. That is not the law. [413]

The Court: You don't need to spend any time on that.

Mr. Preston: The next point I will direct your attention to is the one you have just discussed, and that is that when I came into the case September 3, 1943 the case had been through the District Court and the Circuit Court of Appeals with unfavorable decisions in both courts. The St. Marie case with three strikes against it was also before us at the time. The testimony of Mr. Clark and Mr. Sallee both is that in September, 1943 and before I came into the case they had an oral understanding with Mr. Arenas that the contract should be revamped for the purpose of providing compensation for me. Now, my point of law there is, your Honor, that even though that was an oral contract, when I performed the service and concluded it, as has been done in this case, that even an oral arrangement of that sort was a rescission by consent of the 1940 contract. That is true, because the section of the Code provides that a contract is rescinded by mutual consent or by an executed oral agreement, or by a writing.

In this case from the fall of September, 1943 until the 1st of February, 1945 this matter rested in

parol, orally, but the services were being performed constantly throughout that period. The services continued after 1945 and have continued up until this litigation is concluded. That makes a rescission of the old contract and makes the contract one [414] of quantum meruit as a matter of law.

That is true because of the reading matter of Section 1611 in connection with the cases cited in the memorandum. On the oral feature of it, Section 1611 says when a contract does not determine the amount of consideration, nor the method by which it may be ascertained, or when it leaves the amount thereof to the discretion of an interested party, the consideration must be so much money as the object of the contract is reasonably worth.

The Court: That is Section 1611?

Mr. Preston: 1611.

The Court: Of what code?

Mr. Preston: Civil Code.

So if we had no '45 contract here whatsoever, under the testimony of Mr. Clark and Mr. Sallee, and under the services performed by me from that day forward, you would have a complete case for quantum meruit even though there wasn't a dollar spoken of as to how it should be paid.

The Court: Where does that leave the 1940 contract? What becomes of it?

Mr. Preston: That rescinds the 1940 contract absolutely by consent under 1689, Subdivision (5).

The Court: If that was the intention of the parties why wasn't something said in this 1945 contract about the 1940 contract? [415]

Mr. Preston: I don't know why it should be. I am not testifying in the case on that point, but the testimony here is that it was understood that everything was to be what the court thought it would be worth, that the whole matter should be left in the hands of the court as to quantum meruit, and I couldn't see how there could be any advantage taken of the Indian.

I might say off the record that I am the fellow that suggested that method of doing it so there would be nobody hurt in the matter whatever.

The Court: Is there any explanation here as to why the 1945 contract didn't contain a sentence to the effect that the 1940 contract is hereby superseded or terminated?

Mr. Preston: I don't think there is any express testimony in the record. If I remember right, I don't remember any.

Mr. Clark gave the testimony, he can probably refer to it more readily than I can, but I don't know of any specific statement to that effect.

When the 1945 contract came about, what had happened in 1943 in the fall, just after my employment, about the same time, I think, the ejectment actions were begun. I appeared in those ejectment actions, not only for Arenas, but for others, and filed 14 or 15 answers here in that case, and moreover when the case of Lee Arenas was tried, already there [416] was an understanding with the government that those cases would be dismissed. The Hatchitt cases were to take precedence over all the cases in the St. Marie column, and the trial of the

Arenas case was to take care of his own ejectment suit, and the understanding was that at the time of the trial those suits would be dismissed, and they were accordingly a short time thereafter dismissed. So between September 3, 1943 and February 1, 1945 I had done all the work in these two cases, in connection all the time, of course, with my associates, but I was doing the work all the time and I was leading in the work because I was selected for that purpose.

So the issue in the ejectment suit is the same issue, involved the same thing as the issue that we tried. In other words, the validity of the allotment was involved, and if it was valid it was a defense to the ejectment suit, the same as a right of recovery in the other suit.

So when they come on the stand and say that they signed this 1945 contract for the purpose of taking care of the services performed in the ejectment suit, that is an admission itself that there would be a necessity for a rescission completely of the 1940 contract, because they are the same thing, involved the same issue exactly. That itself to be an abrogation of the 1940 contract.

Now, then, added to that is the fact that in 1945 on [417] February 1st this contract was recast or revised or displaced, whatever you want to call it, the contract covering the entire subject-matter was executed on February 1st, 1945, and it is my view of the law, after looking into it carefully and refreshing my memory on some experiences that I had before on this subject, I am sure that even as to

Clark and Sallee that contract is rescinded, as well as the portion to myself who was never a party to it.

Take the case of Treadwell vs. Nichol in which I participated as an expert witness, Mr. Treadwell was hired by the year by Miller-Lux Corporation, with the understanding that he should, so it was claimed, take care of the individual matters of all stockholders, and he handled a nine million dollar estate matter, tax matter, rather, for the estate of Henry Miller, and he brought suit for \$300,000 for his attorney's fees, and they contended that his services were covered by his previous contract, and he went into and proved an oral arrangement with them, and that was held to be good or justified the finding of the jury in that case, and I quote from that in the brief that I have filed with your Honor.

I remember also the case of Julian vs. Gold, which caused so much talk throughout the bar of this state, which was on the identical same subject that an executed oral agreement is a release completely of an existing contract. [418] Of course, when one is executed in writing it is much more so.

That is our view on the law as I understand it.

This last point suggested by your Honor, I think you will have to hold when you see this record in full that the terms of the '45 contract are broad enough to abrogate all the terms of the 1940 contract. I don't see how it could be otherwise.

The next point to which I desire to offer a few remarks, your Honor, is in answer to the brief of counsel for the United States in this case.

Counsel for the United States have filed a lengthy

brief setting forth various propositions of law, all of which are sound, no doubt, in their right orbit or ambit, but unsound, in my opinion, in the present controversy.

The case of Equitable Trust Company was written in the light of all the points he makes, and the Anglin & Stevenson case was written, also, in the light of all the points that he makes.

Counsel seems unable to understand the position of the government of the United States in this case. The government of the United States through the Congress of the United States not only vouchsafed and guaranteed to this Indian a cause of action for the establishment of his right to an allotment, but the United States is the entity that he has had [419] to fight throughout the entire proceeding. This case, therefore, is one where Congress has given the right of action, and the government of the United States has tried to prevent the Indian from getting his rights under that statute which Congress passed.

All we are contending for here is that Lee Arenas, a Mission Indian of California, shall have the same rights as John Doe or any other white citizen in the community.

This rule of equity with reference to the payment of attorney's fees is for the protection of the litigant, as much, if not more than, for the protection of the Indian getting just compensation.

If the Indian cannot go out into the bar and procure a lawyer upon the same terms and conditions that a white man could do it, he is not getting

under the statute of the United States the rights that are given him on the face of the statute itself. In other words, you must not subtract from the rights of this Indian and yet at the same time say that he has been given justice under this statute.

So when Lee Arenas went out to the bar to get attorneys he had the right to guarantee to them and to trade with them upon the same basis that a white man could have done under the same circumstances.

This situation is a little bit different, too, in other respects. Counsel keeps saying that the United States owns [420] this land. Well, the United States does not own this land. The United States has at most the right of restriction against alienation.

I have cited in the brief to your Honor decisions which give the Indian tantamount to a fee simple.

The Court: How can the government comply with the statute to turn the land over to him at the end of the trust period free and clear of all encumbrances if there is a power to impress a lien upon the land in the hands of the government?

Mr. Preston: I didn't understand the query, your Honor.

The Court: The statute says that the government shall turn the land over to the Indian free and clear. Is that correct?

Mr. Preston: When it does turn it over it will be free and clear, yes.

The Court: Of all encumbrances?

Mr. Preston: That's right.

The Court: If this court were to impress a lien at the present time upon the land in the hands of

the government, the government couldn't turn it over free and clear, could it?

Mr. Preston: I think you will have to read the decision in the Equitable Trust Company case, your Honor——

The Court: In the Equitable Trust Company case they were [421] dealing with a fund, a fund that had been turned over already, and the fund was on its way back into the hands of the Indian, and the fees were deducted from the fund.

Mr. Preston: He made the same assumption, however,——

The Court: There is a statement to the effect that they assumed that the fund was subject to the same conditions as the land, but they didn't directly consider the effect of that statute.

Mr. Preston: The point is, your Honor, under the provisions of this statute the proper interpretation of it is that in a case such as the one before the court the government has waived and cannot insist upon the restriction as to the lien of the attorney for his compensation.

The Court: Can the government waive when Congress has said what they shall do?

Mr. Preston: Congress has already said, that is what I mean—when Congress said that the Indian shall have the right to sue and have established his claim to an allotment, if the Indian has to give us a part of that allotment to get it the government says go ahead. A court of equity has the power.

The Court: Can the court do anything more in view of that statute than this? That is, to impress

a lien upon Arenas' interest in that land, whatever it may be, and a lien upon any proceeds which may be paid to Arenas, but the lien [422] attach only in the hands of Arenas and not in the hands of the government?

Mr. Preston: What I am going to say now, your Honor, in answer to that, may or may not be in my own interests, but I want to make just an observation upon that point. If you give us, as you have signified tentatively that you may, a lien upon the equitable right of the Indian, Lee Arenas, in this land, it will take twice as much land to satisfy our lien as it would if there were was no restriction on it, maybe four times as much. And when the government stands by and permits you to impress a lien upon the equitable right of that land, and contending for its own legal right for these restrictions, it is doing the worst injury it could do to its own ward.

The Court: If a lien is impressed there will be no means of foreclosing it?

Mr. Preston: You might just as well give us nothing. If we can't foreclose a lien, it isn't worth a two-bit piece. They can extend the restrictions as many times as they want to, the President of the United States has the power, and you can't give a lien and withhold the right to enforce it. I will say that, too.

The Court: If the lien is impressed upon the rents of the land, as they are received by Arenas, wouldn't that protect the petitioner? [423]

Mr. Preston: That would not. That would just

be the same as nothing. I would consider that I had worked for nothing under such a state of facts, because you can't give a man a lien and withhold his right to enforce it. You must give the right of enforcement. That is what the lien is for.

The Court: If the petitioners here were entitled to a lien, a certain percentage, whatever the government wanted to turn over to Arenas, they would have to turn over a certain portion of it to the petitioners, would not that protect them? If not, what more could the court do?

Mr. Preston: I am just telling you, the restriction against alienation has waived and is subservient to a court of equity in a case of this character.

The Court: Let's go at it this way: Suppose the court should seek to impress a lien in the hands of the United States and should seek to implement that lien by appointing a receiver to sell, do you suppose that there is any purchaser who would take that title?

Mr. Preston: I think so. If you hold that we have a first lien on that land, why, we will enforce it, and the government will have to come in and either release it or let it go to sale. That is all it would have to do, and that is what it could do if you give a lien against the equitable estate. But if you give a lien against the proceeds, why, we have nothing, absolutely nothing. [424]

The Court: The lien has to be equitable in its nature, does it not?

Mr. Preston: How is that?

The Court: Any lien that would be impressed

would have to be equitable in its nature, and the government holds the title, how could title be passed?

Mr. Preston: I am telling you that Lee Arenas owns that land for the purposes of paying us, and he owns it free of any claim of the United States.

The Court: Let's just analyze that a moment.

Mr. Preston: All right.

The Court: Lee Arenas couldn't sell anything on that land today, could he?

Mr. Preston: No; but you can put a lien on it that is prior and over the claim of the government against selling it.

The Court: Assume it is worth a million dollars, he couldn't borrow \$100,000 on it, I don't suppose, could he?

Mr. Preston: I don't know whether he could or not.

The Court: Could he borrow \$10,000 on it, do you think?

Mr. Preston: I don't know whether he could or not.

The Court: Could he get a mortgage?

Mr. Preston: That is why I stand before you and say that if you will make an order of the court that he can give a mortgage, he will do it. If you will permit him to make [425] a mortgage, he will make it.

The Court: If he can't do it, then to put the petitioner here in his shoes wouldn't help any, would it?

Mr. Preston: You can give consent for him to make a mortgage without any trouble at all.

The Court: Where is the authority for it?

Mr. Preston: And you can give a lien on it that will be prior to any claim or restrictions by the government. I do not understand this situation anyway. Here is an entity that for 30 years has refused to give the Indians their rights——

The Court: There is no question about it.

Mr. Preston: Then why listen to them here now? They haven't any right to object to this method of disposal at all.

The Court: We are here to apply the law, if we can discover what it is.

Mr. Preston: That is what I am telling you, the Equitable Trust case is the authority for the law that you cannot deceive a cestui que trust out of his rights by the imprudent or wrongful acts of the government of the United States.

The Court: If the government had given Arenas the land, or someone else the land, as in the Equitable Trust case, and the land was on its way back into the hands of the government, then it would be no trouble at all to impress a lien [426] and take a part of it.

Mr. Preston: I have read that thing until I am black in the face, and that is the tersest, most concise and the most far-reaching statement of a decision I ever read in my life, and it says in so many words, and properly interpreted, that it is within the power of a court of equity and it is its duty to protect a cestui que trust against the wrongful acts of a government.

The Court: How far should we go?

Mr. Preston: Here we have the wrongful acts of the government admitted, here we have worked for seven years,—if we are cast off on what we can get out of the proceeds, I can't get the \$256 that I put up as costs in this case.

The Court: I suppose the government is giving Arena several hundred dollars a month now, aren't they?

Mr. Preston: I never heard of it.

The Court: Do you mean he isn't getting any money out of this land?

Mr. Preston: He gets it out of the land, not out of the government.

The Court: Who permits him to get it out of the land?

Mr. Preston: They have got a right to it.

The Court: Who has a right to it?

Mr. Preston: Arenas. He has a right to the use of the land. [427]

The Court: You mean he has a right to operate this land?

Mr. Preston: I think so. I don't know why not. That is my understanding. If he gave a long-term lease he might have to give a permit of some kind, I don't know about that, but for all intents and purposes Lee Arenas owns the equitable title to this land and the legal title, except the bare legal title that remains against alienation.

That is all I can say. I have done my best, and so have all the rest of us, we have worked like the dickens, and there is no appreciation as far as I can see, so far, either from the government or the

Indians, and if you can't give us a lien on something or other, then we are in a hopeless mess.

In the eventide of my career at the bar I hope to get a little something out of this case.

The Court: You do not want to wait until the trust patent expires?

Mr. Preston: They have already extended it. He will tell you that they have extended it until 1964, or some other time. Sure they have extended it. We get nothing.

Mr. Clark: May I supplement the remarks just a few moments, your Honor?

The Court: Yes.

Mr. Clark: Replying to your Honor's inquiry as to why, viewed from the record now before the court, the later contract [428] of 1945 made no reference to the earlier contract of 1940, and not supplementing by any means that which is now in the record, I make these suggestions to the court: that within the rules of law set forth in the last memorandum we have filed it was entirely competent for these parties to agree even orally upon an abandonment and immediate termination of the earlier contract at any time while the contract remained executory. The law in California is well settled and affirmed as recently as within the last three years that this right of termination by mutual consent does not require any consideration to support it. It requires only the mutuality of consent; that it may be exercised at any time while the earlier contract remains executory, but may not remain after

the earlier contract has been fully performed upon either side.

Now, having in mind that rule of law it does, of course, occur that there are several ways in which such mutual abandonment and termination may be evidenced. It may lie, as the cases say, only in the conduct of the parties in that that which they do after the date as of which it is claimed by one or both parties that the contract was terminated the conduct is consistent with the fact that on that day or thereabouts they did agree upon a termination or abandonment of the earlier contract in writing.

The Court: My question, Mr. Clark, was directed to the [429] evidence as to whether there was some explanation that I had not seen from surrounding circumstances that would explain why there wasn't some simple statement in the 1945 contract to the effect that it supersedes the 1940 arrangement.

Mr. Clark: The evidence shows the matter was discussed preliminary to the coming in of Judge Preston, and at the time when he came in, and that evidence is before the court. This writing, which was not at all required under the law, executed in 1945, does refer to the fact that there had been a previous employment of these counsel in the very matters involved in the case at bar. In other words, it says in the third line, “* * * have constituted, appointed and made, and by these presents do make, constitute and appoint * * *.”

“Have made,” of course, refers to that which the record shows without any dispute was the situation

that existed at the time when Judge Preston accepted the appointment.

I say to your Honor, only from the face of the contract and the evidence before the court as to the conversations between the parties, that it did not seem that it was necessary or even desirable to make reference to that which was thereafter to be dead, because none of its provisions in any respect had anything to do with this engagement. I say that against our own interest, perhaps, it might appear, because in that earlier contract, as your Honor very aptly observed at the commencement of the hearing today, there is a provision for the division of the land in kind in the event an agreement otherwise is not arrived at.

There is no such provision in this writing. We do not claim in any slightest respect any right in this matter now before this court to a division in kind by virtue of that earlier provision of the first contract, because it is our opinion that the evidence shows that the first contract was completely wiped out, it was completely abandoned, it was superseded in its entirety by the agreement which is evidenced by the second writing. And if as we believe we are entitled at the hands of this court to a division of this land in kind, and which we do deem in view of the vast discrepancy and the opinions of the experts as to the value of the land is the most equitable manner of providing for the payment of our fees, we rest entirely upon the law applicable to the situation here and not at all on any provision in the earlier writing.

As I say to your Honor, I drew this writing, and I feel now that were I to do it again I would not feel that it was necessary or even desirable to encumber a writing which is full and complete within itself, in evidence of the obligations of the respective parties, to encumber it by a reference to something inconsistent therewith, that theretofore [431] had been reduced to writing and executed by the parties.

Next, may I say just these few words, your Honor, supplemental to that which Judge Preston has said in respect of the power of the court here? That which we must not lose sight of in the determination of the jurisdiction and power of this court in the matter before the court is this fundamental fact: the Secretary of the Interior today could by his order, without consultation of Congress or any superior, free this land entirely from any restraint. That is the power of the Secretary. Since the Secretary has the power of absolute release in his own uncontrolled discretion of the entire corpus of the estate, whatever it may be, of these Indians in these lands, it necessarily follows under the principle that the greater includes the lesser, that the Secretary has the right today in his uncontrolled discretion to release that portion of the land which would constitute, when delivered to the attorneys in this matter, a reasonable compensation for the services they have rendered.

Equity always operates upon the conscience of a party. The reason that we are here is one of a failure of the Secretary of the Interior to perform his sworn duty. The Congress told him in 1918 that

the Congress had exercised on its own behalf the right to determine whether or not these Indians had attained that degree of civilization in [432] which they could thereafter properly own and hold and manage property in their own right. Prior to the enactment of that legislation the Congress had delegated the right to make that determination to the Secretary of the Interior, but since the Interior had never seen fit to make any allotments to the Indians of the education and intelligent capacity of the band of Indians involved here, the Congress in that year 1917 made the determination and directed by its mandate the Secretary to proceed forthwith with the making of these allotments. The Secretary did not perform his duty. It therefore became necessary for the beneficiary of the trust, for the ward of the guardian, to employ counsel, as he did in this case, to compel the Secretary to do his duty. Therefore, what the court did in its decision in this case was simply to operate upon the conscience and the capacities and the powers of the Secretary of the Interior to compel him to do the thing which the Congress said he should do.

The Court: It is your view, then, I take it, that if the court has the power inferred by Congress in an action such as this——

Mr. Clark: That is my point.

The Court: —to step into the shoes of the Secretary of the Interior and do his duty with respect to making an allotment, it has also the power to do justice under the circumstances where the Secretary refuses so to do? [433]

Mr. Clark: That is exactly our point. And if the court possesses, as the Supreme Court has held, the power to compel the Secretary to make the allotments, certainly the court has the power to compel the Secretary in the exercise of a discretionary power to issue such an order, or it will be made by the court in the place of and for the Secretary to make such an order for the division of these lands in kind as can reasonably compensate the lawyers who were employed in the proceedings to compel the Secretary to do his duty.

Equity, your Honor, when once it has taken hold of a subject-matter administers complete relief. And it has been said to the very honor of our profession that equity knows no bounds. The exercise of the powers of equity are as broad as the emergencies and the exigencies of any case, however strange, novel, and without precedent they may be, as, if and when they come before the court. And I say to your Honor that it would be a manifest injustice not only to these counsel—we occupy a very minor position in these proceedings, as I want to let this record show in just a moment in my closing remark—but it would be doing a very manifest injustice to these Indians if this court should hold that having the power to compel the Secretary to do his duty it lacked the power to compel the Secretary to make an order, or in the absence of the Secretary making it, even [434] under the order of compulsion the making of the order as a record of this court in the place of and for the Secretary, to divide these lands in kind, in order that these attorneys may be prop-

erly compensated, I say is absolutely contrary to every rule of reason that threads itself through all of the jurisprudence in America.

The Court: Do you think the court should rather encourage members of the bar to take up the cause of the Indians?

Mr. Clark: That's right, your Honor. I am not unmindful of the fact that the District Judge, occupying the same position in our jurisprudence as does your Honor, in Seattle quite recently took severely to task the members of the bar of that court when he said that he recognized that during the emergencies of the war there had to be very great inroads upon the constitutional rights of our citizens, but he reproved the bar of that court because he said that the lawyers had been unwilling, in his opinion, to advocate as against the government the encroachment upon the constitutional rights of the citizens not justified by the emergency of the war, and he thought that the bar was subject to the very severe and drastic rebuke that he administered to them. And I say this to your Honor, that I think that it is not only one of the highest privileges, I think it is one of the most sacred duties of any lawyer, when confronted with a [435] situation where a ward of the United States, a ward not of choice, but a ward of necessity and of compulsion, as the Indians are, of the United States, finds that he is being held in slavery, that he is being allowed only a very meager part of the substance which under the treaties gave this land to this reservation that is his. And why? Simply because the oligarchy

of the Secretary of the Interior in its Indian Department desires to perpetuate its authority.

I say in those circumstances we deem it to be—though we never got a dollar for it—one of the most drastic commands upon our time and upon our thought and upon our service, even though we appear against our government to our prejudice in other matters where our government is concerned with our clients, to see that the rights of those wards are redressed. And if I had it to do again, your Honor, I would do it.

May I say this, and it answers, I think, the very suggestion your Honor made? In other words, if the court has the power in equity to compel the Secretary to make an order giving a fair division to the lawyer, in payment of reasonable compensation, will it encourage lawyers to embark upon litigation for others against the government?

There can be no harm or fear in that, if such be the logical result, because always it lays in the hands of the court to determine, first, the nature and the character and [436] the value of the services that the lawyer rendered; secondly, what the fair compensation would be as between all of the parties involved; and, third, what is the equitable way of meeting and paying that compensation. And I say that there can never be any danger to the Republic, there can never be any danger to any principle of our jurisprudence reposing in the proposition that lawyers will be encouraged to embark upon litigation if in the end the court is going to say what is fair and right and reasonable, because when the

court has so spoken he has justified the embarkation of that lawyer upon that mission.

And may I say this, your Honor. This is the thing that lies behind this present movement, that transcends in its importance any interest of any of these three lawyers involved, or any of the parties involved in this litigation: if this court is to say that this court lacks the power either to fix the amount or to provide reasonably for the manner and the time of its payment, the compensation of lawyers who are employed by the wards of the government to compel the government to do its bounden duty, then the Indian agency is going to be permitted to continue from now on until the Indians, the vanishing race, have perished from the earth, and when they perish they are going to perish with the shackles of that slavery which even the Supreme Court condemned in this very case still upon their limbs. [437]

I shall never forget in that, my first and only appearance before that court, when I in the commencement of my argument upon the doctrine of estoppel—Judge Preston argued the question of statutory interpretation, but when I began the argument upon the doctrine of estoppel, predicated upon the fact that it was the duty of the Secretary of the Interior to make these allotments, that after these certificates had been issued the Secretary, as the record showed, had said to Mr. Wadsworth, the allotting agent, “You may say to these Indians that they may immediately enter into possession of these allotted properties, they may spend of their own private funds for the improvement of those prop-

erties and enjoyment, because the patents will be issued in due course of time," and they did it, and in this very case thousands of dollars of the personal moneys of Lee Arenas, that had been earned by his own industry and saved by his own carefulness and thrift, was expended in the improvement of this property, which if the allotment could not have been made would have become the property of the tribe, and when I began to make that argument the Chief Justice leaned forward and he said, "Mr. Clark, you need not spend any time in telling us the reason why and the forces behind the refusal of the Secretary to perform what you urge to be his duty in this case." And almost at the beginning my argument upon the doctrine of estoppel was at an end, because the court recognized the soundness of the doctrine.

And when in rebuttal I had concluded the argument, I had that most unusual, as I was told by the clerk, experience when Justice Frankfurter, the only member of the Jewish race on that bench, and with the room packed with government agents, leaned forward and in a voice audible throughout the court room said, "Mr. Clark, I want you to know I am with you 100 per cent."

Now, I say to your Honor that in a situation of that sort, not alone as represented in the opinion of the Supreme Court and represented in the dissenting opinion of Judge Garecht in the St. Marie case, and in his majority opinion in this case, but represented in the heart and the mind and the soul of anyone who knows anything about the facts, so great

an injustice cried out for remedy at the hands of lawyers who knew that unless this court had the power, which we invoke in the fixing and the payment of our compensation, we would undoubtedly go unrewarded, unless it would be at some future time to our children, and perhaps even to their children, because as Judge Preston says unless this court has the power to do that thing which we are asking this court to do, then it means by succession of continuance Judge Preston and I and Dave Sallee would be moldering like Old John Brown in the grave before ever a dollar could come from us, because the income from this property is not more than is required to take care of these Indians, and I say to your Honor that while we came into the case to oppose aggression, we are not coming in now with that service finished and being aggressors in our own right, and we don't want to take one dime from any one of those Indians which is needed for the proper education and the proper support and the proper care of those Indians. Not at all. We would rather go unrewarded, but we say that under the rule of reason that is written into every statute of Congress, and it is written into the statute which told the Secretary what to do in respect of the allotments to these Indians, inheres the equitable power of this court not only to say, as the Supreme Court has said to the Secretary, "You make those allotments," but also to say to the Secretary, "Since you have the power to release the land, now at your own uncontrolled discretion, and since your misconduct has been the reason why these lawyers have

been required to labor for nearly eight years in getting at the hands of the law the power to get you to do the thing you ought to do, then you must now do the other thing you ought to do, and that is you must provide for the just compensation of these lawyers by making your order immediately for the division in kind upon the basis that this court sitting in equity says is a reasonable basis for division of this land between the Indian and the lawyer." [440]

May I just say, in concluding, your Honor, it isn't a pleasant task to fight our government, it wasn't a pleasant task to begin this fight in the face of the St. Marie decision, but I say to your Honor we found our pleasure in the fact that I think that we have lived up to the highest and the best traditions of our profession, and just as when I took my oath, and your Honor took your oath, and Judge Preston said his, we said that we would never turn down the cause of one who had a righteous claim against another, simply because he was unable to provide that monetary return, but we would take care of them. And that we did.

We believed then, and we believe now, if we were successful equity would find its way to compel the Secretary to do the thing that was right and just. And if it doesn't have the power to do it, then I say the Indian Department knows it is perpetuated in its existence and in its tyranny, a tyranny that has become a matter of the greatest reproach and of the greatest shame of anything that has ever happened in the United States of America. It dwarfs in its infamy the slavery of the black man in the south.

And I say to your Honor that we have always felt that even though we go unrewarded we have done more than we ought to do, but we have always felt that our government, acting through its court sitting in equity, will say in the end that no Secretary having the power to divide is going [441] arbitrarily, because of his prejudice against the success of the Indians in this litigation, to say, "I will not make that order to divide, and therefore you can rot and your children can rot after you, and the profession can know in behalf of all Indians that they can't get a dime, then see how many of you will have the nerve and fortitude to come forward and prosecute such claims against the government." I say, your Honor, that is our attitude. We are not aggressors. We come here asking only that which is fair in the evening of the day which has seen done the thing we began to do, and justly began to do more than nearly eight years ago. And had we refused to do it, we would have been justly subject to the censure and the criticism of the bar and of the courts of this country everywhere.

The Court: Gentlemen, I will have to adjourn at 3:00 for today. Would you like to continue the argument tomorrow morning?

Mr. Brett: Yes, your Honor.

Mr. Taheny: Yes, your Honor.

The Court: Are you here from San Francisco, Mr. Taheny?

Mr. Taheny: Yes, your Honor.

The Court: It is your view, Mr. Clark, that the

court should undertake to divide the land between Lee Arenas and the petitioners?

Mr. Clark: We have no doubt of it, your Honor. We think [442] it is the only equitable way to do it. We thought so when the original contract was drawn and so provided in the contract. We thought so when this contract was drawn, which left it to the uncontrolled discretion of the court in fixing a quantum meruit with compensation not only to say what it should be in amount, but what it should be in the manner of its time and payment.

The Court: How would that be done mechanically?

Mr. Clark: Always in partition we are met with those problems, but I think this land admirably is adapted to a division in kind, and we do have, if and when your Honor should indicate such a conclusion, a suggestion to make as to how it should be done. But we think equitably it can be done both to ourselves and to the Indians, and in a way that each of the reserved properties could be integrated as a productive income unit.

We haven't, as I say to your Honor, made any suggestions on that. We did not wish to presume, because your Honor is pioneering in this particular matter. We have the authorities to which Judge Preston has referred, which we think are applicable and controlling here in principle, but the facts here differ somewhat. But, as we say, equity never refuses its relief because of a different and novel or unprecedented situation presented, but it will always so mold its decrees so as to be fair and just.

But when your Honor should indicate, if your Honor does, that that is a proper thing, we then do have a definite plan to suggest to the court as to the matter of partition.

Mr. Preston: I might say offhand, your Honor, that Mr. Clark and Mr. Sallee are the exponents of that doctrine. I haven't put anything in their way, but personally I would rather have the money.

The Court: I will recess the hearing at this time, gentlemen, until tomorrow morning at 10:00 o'clock.

Court will adjourn. [444]

Los Angeles, California

Tuesday, March 30, 1948, 10:00 a.m.

(Case called by the clerk.)

Mr. Preston: May it please the court, I would like to say two or three words about one case before finally closing. I desire to invite a re-examination by the court of the case of United States vs. Anglin & Stevenson. The court no doubt remembers well, but in view of the question propounded to me yesterday or the statement, rather, made by the court yesterday, that these funds——

The Court: That case is in the record?

Mr. Preston: 145 Fed. (2d) 622; United States vs. Anglin & Stevenson et al.

The court stated yesterday that the consent of the Government in the Equitable Trust case was implied, or at least said that the funds were on their way back to the restricted area, held by the Secretary of Interior, and he had previously approved.

That is true. That is not the case in the Anglin & Stevenson case.

Jackson Barnett died; he was a restricted Cree Indian, and his funds, the funds of his estate and his property, I think, as well as some species of actual personal property, were in the hands of the Secretary of Interior. And the Department of Justice—not the Secretary of Interior—brought this suit in the name of the United States to [446] determine the heirship to this restricted fund. The heirs of this fund would also be restricted the same as the decedent Barnett. So this money was in the process of passing out of the possession of the Secretary of Interior and into the possession of the heirs. They were restricted in the Secretary's hands, as I have already said, and they were restricted or would be restricted in the distributee's hands.

The court held in that case, by virtue of the suit by the Government through the Department of Justice, and by virtue of a statute which gave the court that power to determine heirship, that that gave the court complete jurisdiction of the whole fund.

I do not think I expressed myself accurately yesterday in this particular: What we contend here now is that, by the Act of 1894, complete jurisdiction over the allotments involved in a lawsuit by an Indian against the Government comes under the jurisdiction of the court.

The Court: In other words, your view is, as I understand it, that the court having taken jurisdiction of the res, namely, the land——

Mr. Preston: That is right.

The Court: —for the purpose of making the allotment—

Mr. Preston: I started to say “res” yesterday and I had forgotten it. [447]

The Court: —being a court of equity, I may retain that jurisdiction to see that justice is done fully.

Mr. Preston: That is right. And this court holds, further, that the Secretary is bound by the judgment against the United States. That is all I care to say about that.

The Court: Mr. Taheny, do you wish to argue first?

Mr. Taheny: Mr. Brett wishes to argue first.

Mr. Brett: I just want to mark one volume here, your Honor, to save time, and then I will proceed.

I can't begin this statement, your Honor, without paying very sincere respect to the marvelous oratorical statement by Mr. Clark. I know I was moved by it, and I feel reasonably sure that anyone who was present in the court was moved by it. It is one of those gifts that God gives to few of us, and the rest of us can only wish that we had it. I am not, I believe, a jealous man, but I certainly can say sincerely that I would that I had even one-tenth of that oratorical ability in this case or in any other case. Since I do not have it, I will not attempt to essay such a type of argument to the court.

The Court: I suppose that, not detracting from anything that you have said or what was demonstrated here by counsel, it would not be very difficult to feel deep emotion in fighting a case such as this,

where 31 years has passed without a high officer of the United States doing what [448] Congress told him to.

Mr. Brett: I think that is true if the facts are true.

The Court: Is not that a fact? Is not that a fact?

Mr. Brett: I say, if the facts were true. I am not here, and it is not going to be the purpose of this argument, to dwell very long on the defense either of my country or the higher officers thereof.

I yield to no one in my belief in justice; I yield to no one in my belief that we have got a fine country and that, generally speaking, its higher executive officers have done a very fine duty.

The Court: It might clarify the atmosphere if you, speaking on behalf of the Government, could offer some explanation why, when Congress told in explicit terms the Secretary of Interior what to do in 1917, 31 years have passed and, as I understand it, it is conceded that the only Mission Indian who has received an allotment pursuant to that direction has received it, not at the hands of the Secretary of Interior, but at the hands of the court after two trips to the United States Supreme Court. I would like to hear you.

Mr. Brett: That is a very large assignment. But in view of the fact that your Honor has inquired of me——

The Court: Are there any misstatements of fact in that [449] question?

Mr. Brett: Not of fact, your Honor; and there is no criticism of your Honor, because I realize that

you are merely stating what higher benches have said and I am satisfied, in part, was moved by the very type of argument we had yesterday.

The Court: I just want to be sure that my question does not assume any fact. I understand that there is no question but what in 1917 Congress told the Secretary of Interior to allot the land to these Mission Indians. Is there any question about that?

Mr. Brett: May I—I do not ordinarily desire to ask a question in answer to a question, but I feel, before I can answer it in this instance, it is proper. May I ask if you are asking in reference to what we know now or in reference to what we knew in 1917, or even up through 1944? And the reason is this, your Honor:—

The Court: What is the statute? Is it ambiguous?

Mr. Brett: I think it is, because the judge of this court—a judge whom I admire very greatly, but who makes mistakes just like other judges and just like other lawyers—in examining that law the first time that I was in this type of case, the St. Marie cases, in construing the 1917 statute construed it not to be mandatory.

The Court: Well, assuming it is directive. [450]

Mr. Brett: Now, in addition to that, the Circuit Court in passing upon the matter construed that not to be mandatory.

The Court: Assuming it is directory, is there any question but what the Secretary of the Interior should have carried out the Congressional direction?

Mr. Brett: Your Honor, let me answer you as

direct as I can. I will say this, and I want to explain my answer, as witnesses sometimes do. And I say, briefly, that I am not here and it is not the general purport of my argument to defend the United States on specific matters. I want to get down to a lawsuit, but I feel that we should answer some of these statements of such grave misjustice.

Congress in 1917 passed a statute. It passed a statute at the request of the Secretary of Interior at that time—a statute in which there was considerable dispute as to whether it meant this or meant that. The law in effect at that particular time specifically prescribed that the Indians would be able to make a choice or selections for allotment. It was an act to be done by them, not for them and not by anyone, but by them.

If within four years they did not do so, then—and bear in mind that the statute said that the four years had to expire—then it became either the duty, as you would properly construe it, or the power and the authority, if you construe it the other way, of the Secretary of Interior [451] to do something for them as distinguished from their doing it themselves.

Now, it went to 1921. It takes a little time, of course, for executive officers to act. I do not think that by getting the first appointment out, the work done and completed by 1923, in the magnitude of the duties of the Commissioner of Indian Affairs and the Secretary of Interior, we could say that was extremely dilatory.

He did appoint an agent. And this very litigant here, whom I happen to represent and whom I am very proud to represent—I like Lee Arenas as I begin to know him—he was one of the leaders, with a man by the name of Johnny Boudreau (Phonetic), he was one of the elders, one of the leaders, one, I would say, of the most intelligent at that time of the small group of Indians comprising this tribe.

I would say, in addition to that, that they signed the telegram or signed the letter and said: “We don’t want allotments, regardless of how they may have been selected.” These poor Indians have been swayed by so many threats that it is just a grievous shame, and it still is. Nevertheless, the more intelligent ones said: We don’t want allotments, and the basis and reasons that they did not want the allotments was, as they stated, that a good many of these people were not in position to take care of this property.

And parenthetically there, your Honor, irrespective [452] of the respect I give to the United States Supreme Court and the Honorable Judge Garrecht whom I respect very highly as one of the ablest men on our bench, I think if he had gone up there, as I have gone, and seen a number of these tribes, he would never have formed a conclusion that the tribe, as a unit, and each and every one of them, are presently so informed that they are capable of managing their affairs, or if they were given this property in severalty that they would have it 30 days. I submit they would neither the proceeds for it nor the profit within 30 days.

And, as an example, I again parenthetically—and I am going to get back—I have just received word within the last few days, which may or may not somewhat depend upon this case, as I will demonstrate, result in another piece of litigation—I am informed that one of the members of the tribe out there who has been permitted to operate some lands there as a trailer court—another trailer court case—having an income of in excess of \$6,000 a month has let that out to a white man for \$100 a month.

I do not think that demonstrates capability of managing important affairs. But the main thing is this: The intelligent Indians, the ones who were better informed, the ones who had the interests at heart so far as could be seen, opposed this matter.

Now, it is true that between 1923 and 1927 there was a change of heart. I can't tell you how it occurred. I do not know what the influences were. But there was a change, and it is true that this man was instructed to make selections for those who desired the selections, and he did so. And that left a great many out in the cold, because there were still quite a few that did not want any selections, would not have anything to do with it; and that is the unfortunate setup here now. There are quite a number here, relatively 60 members of this tribe, that have no rights if these allotments go through.

Of course, we do not have to decide policy in this court. About that time there began to be various influences on Congress. Now, it may be true, and I think it is true, in a number of those occasions, by the Commissioner of Indian Affairs and by the

Secretary of Interior, and he could have been using erroneous judgment. I do not know.

The Court: Before you leave that earlier statement, aren't all of the members of the tribe entitled to share in these allotted lands?

Mr. Brett: Not if the allotments went through, because there would not be any for them to share in; not if they were allotted in the manner in which these were allotted.

However, your Honor, that is one reason I said I wanted a little time. I want to discuss this later, but I will [454] mention briefly this, because I have asserted it before to your Honor—and I make my assertions in good faith, whether I can always support them or not—I still believe, as I have always believed ever since I have studied this Indian law, that every member of that tribe has and still has and will continue to have, unless Congress changes the law, the right today, tomorrow, or the next day to make a selection of any unallotted lands and to enforce that selection. And I have a reasonable belief, because I still believe that the representatives of the United States in executive capacities, in the main, want to both obey the law and do their duty. That has been my experience with most of them. I have not found any that I could say that affirmatively or expressly have any other view. It may be some may have mistaken views or judgment, or have not exercised what I would think would be proper judgment.

And I think that any of them today, they do not have to go and try to enforce those other allotments.

I am satisfied they do not. I am satisfied that they would simply have to make a selection. I believe that it is reasonable and probable that if they made a selection, the selections would be approved.

Now, why do I say that? Let me again continue. Now, about that time Congress began to get concerned, and it had many, many representations. I assume that those representations [455] would have had various backgrounds, but they resulted in this Wheeler—I can't think of the other man's name—Act, which provided that allotments were to be completely taken away. But there was a condition, one condition subsequent, and that was that it had to be by a vote of the tribe. In other words, the tribe had to accept or refuse to accept.

Now, that, again, took time, even with a tribe of 60 members. But finally the tribe, in this instance, decided that they did not want to have anything to do with this Wheeler bill, which meant that the taking away of allotments——

The Court: That was in 1927?

Mr. Brett: Oh, no; that was subsequent to that, your Honor. That was about in 1934, between 1932 and 1934.

Then very shortly after that, these so-called St. Marie cases. Lee Arenas was not for that St. Marie case. At that time he was against them. He did not want to get in on that. A great many of the other Indians who were, I think, the more intelligent group, did not want to do that. But nevertheless, actions were brought.

Now, the Indian is just like any other litigant. I

would say this: More than any other litigant, I think it is the duty of the public officer, when a matter is submitted to the court, to go very, very cautiously until the courts [456] have had an opportunity to pass on the matter, and then abide by what the courts decide. If there is any one group of the public which should adhere to the rule that this is a country of law and that we should follow the law, it is those of us who represent the people as a whole in what is called the United States of America, or who might be said to be governmental representatives.

Now, there was a hearing before Judge Yankwich. These matters were thrashed out. Whether he decided rightly or wrongly is not important now. The fact is he did decide. It was submitted to him and he decided that these allotments were not proper, that they were not enforceable, and that they were not just; and particularly decided that the Indians were not capable at that time of taking care of their own affairs.

Now, it is true——

The Court: Did he make the decision that the allotments were not just and that the Indians were not capable?

Mr. Brett: I think he did, your Honor, as I recall the decision.

Mr. Taheny: He made the second finding, your Honor, but he did not make the first finding.

The Court: Are not those matters for the Secretary?

Mr. Brett: Sir?

The Court: Are not those matters for the Secretary only [457] to determine?

Mr. Brett: Well, apparently not under the present trend of decisions, although I would say this: The Supreme Court did indicate that the Secretary did not have to find it in a specific way, and that by action he may have been deemed to have found it, certainly.

At any rate, Judge Yankwich did not have Lee Arenas before him. He did not have even the type of character of Lee Arenas before him. He had other Indians. If you had seen those Indians, you would not be surprised that he arrived at the conclusion he did. That is merely in passing. I am trying to explain some of these so-called injustices.

The Government at that point was concerned and confronted with a decision of the court. The matter was taken on an appeal. The only proper and logical thing that I could see, and, I believe, on due consideration, that your Honor would feel it would be proper of a Government official, was to wait and see what the Circuit Court did; and the Circuit Court affirmed it.

This very matter of estoppel that is brought up here was urged in that case and was overruled by the Circuit Court. It is true Judge Garrecht wrote a very vigorous dissenting opinion, but the court decided the other way.

Now, it is true that the United States Supreme Court denied the petition for certiorari because it was out of [458] time. The fact is it was a final decision.

Now, it is true that the matter was again brought. It is true that ultimately the Supreme Court has been called upon to decide and has decided that this Act was mandatory, instead of discretionary, has decided that certain actions of the Secretary were conclusive.

With due respect to Mr. Clark, I would say that I had never heard of an instance before where what he recited had occurred; and I think he is to be highly complimented if he was persuasive enough to get such a statement from the bench, from the judges. But still, with due respect to him, I can't read into the Arenas decision in the Supreme Court or into any decision that I have found yet in either series of the Arenas cases, excepting Judge O'Connor's later lower decision—in which this part I am referring to was not affirmed or even referred to by the Circuit Court—I can't find any holding on the basis of estoppel.

I think the decision on the Arenas question that we are confronted with was based upon two things: One, that the Secretary, by his actions, as discretionary, perhaps, from an express statement, had made findings that these Indians were capable within the provisions of the Allotment Act; and secondly, that once that finding was made, it was mandatory and required of the Secretary that he approve these selections, if the selections were properly made. [459]

That is all I can read in that decision. If your Honor reads more, I can't. There is, of course, a large dissipation of the so-called wrong.

Now, about the time, if the court please, that we finally got that phase of it cleaned up, the Lee Arenas case. I submit to you maybe we used poor judgment. I do not know. But when you are required to exercise discretion and judgment, you sometimes use it poorly and you sometimes use it wisely. The best judgment we could conceive of in the matter, again, in the case was to wait and see what the court did with it.

Now, we took the view, as your Honor knows from reading the memo, that the matter had been disposed of, and we had Judge O'Connor originally deciding with us summarily.

The Court: Was that not Judge Yankwich?

Mr. Brett: Sir?

The Court: Judge O'Connor was not in the St. Marie cases, was he?

Mr. Brett: No. I am now talking about the first Arenas trial.

The Court: The first ruling on the Arenas case was made by Judge Yankwich, was it not?

Mr. Brett: No, sir. No, your Honor. The first holding was by Judge O'Connor, a summary judgment.

The Court: I had the impression that the dismissal [460] was made prior to the first decision of the United States Supreme Court by Judge Yankwich.

Mr. Preston: No.

The Court: I am wrong.

Mr. Brett: No, your Honor. To that extent you are in error. What happened was that within a very short period of time, I think it was within three

months at most after the St. Marie case was final—it may have been even shorter—the Lee Arenas case was begun, and the Arenas case brought in nothing new whatsoever that was not in the St. Marie case. It simply said this: It said that the St. Marie case was decided erroneously because the Act of 1917 was not, as Judge Yankwich had held and as the Circuit Court had held in the major opinion, but was as Judge Garrecht had held in the minority opinion, a mandatory Act instead of being a directory Act. That is all there was in the Lee Arenas case; that is the sole issue, was just a re-determination of an issue of which——

The Court: You are talking about the opinion by Mr. Justice Jackson in 322 U. S. 419?

Mr. Brett: No. I am referring——

The Court: May, 1944, is that it?

Mr. Brett: No. I was referring at that moment to just the Arenas case. I say the Arenas case was a redetermination of the matters which had been determined. [461]

The Court: Are you referring to the first opinion of the Supreme Court?

Mr. Brett: Yes, sir.

The Court: In other words, Judge O'Connor dismissed it upon the authority of the St. Marie cases.

Mr. Brett: That is right.

The Court: The first complaint in the Arenas case?

Mr. Brett: That is correct, sir. Yes, sir.

The Court: Arenas took an appeal and the Cir-

cuit Court, relying upon the St. Marie case, affirmed it?

Mr. Brett: That is right.

The Court: And the United States Supreme Court reversed?

Mr. Brett: That is correct.

The Court: That was in 1944, and then was when the highest court of the land determined that this was a mandatory statute, is that it?

Mr. Brett: That is correct.

Now I want to come to one other point. I am later going to discuss them in detail.

After the Circuit Court affirmed the summary judgment, which included an express holding that there was no estoppel, the Commissioner of Indian Affairs, in cooperation with the Department of Justice, commenced necessary initial proceedings to get things in shape so that we could have a new allotment. We went down and had numerous hearings at which they called [462] the Indians in and discussed with them to try to find out what the Indians wanted. We did not feel, in other words, that the Supreme Court was going to grant certiorari. We guessed wrong. That was the instance of the so-called ejectment suits.

In other words, the Indians, as they have now, were occupying some of these allotments with no conceivable legal right, but we did not disturb them because we were in the midst of litigation and nobody knew what was coming up.

We went down and we talked to the Indians. When I say "we", I did not personally. Mr. Nor-

man Lyttel, Mr. Eugene D. Williams, and some men from Washington. They were consulting with me, and at that time I was in charge of the major office here. We were still in the midst of war and, although I had handled these Indian cases and they consulted with me for whatever it was worth to give them my views, I did not personally go down to Palm Springs because I could not be away from the office. But I was keenly in touch with it. We started all these ejectment suits with the idea that we would get an adjudication; that we would bring the thing right back again as tribal property so that when we did get allotments it would be clear what Congress said to give them. And just about that time, when we got that all lined up, the Supreme Court granted certiorari. It had nothing to do with any reasons filed by Judge Preston [463] or anybody else. It was when the Supreme Court granted certiorari and the matter was again reopened, and certainly we did not want to take any steps that might be indecorous; so we dismissed the thing without prejudice.

The Supreme Court granted certiorari, the matter came back to Judge O'Connor and came back to the Circuit Court. And, as your Honor can tell from reading the opinions, in the main, what those eminent judicial officers thought was simply this: They took the pattern that Judge Jackson's opinion had given, and they simply followed and complied with that pattern.

It is true that certain oral evidence was offered, practically none of it in conflict. An examination of

the file will demonstrate that to your Honor; but I think I could safely say that 85 per cent or more of the matters were in a stipulated pre-trial statement. And, of course, we come out with this decision.

The Court: Is it your view that the law was settled in the opinion by Mr. Justice Jackson?

Mr. Brett: I think the law was settled to this extent: That unless the Government could show some different circumstance then it had theretofore shown, that the law was settled; and there was never any contention that we could show any different circumstances.

The Court: Well, the Government did not accept that [464] decision as final, did it?

Mr. Brett: No; that is true; that is quite true. And, as a matter of fact, if the court please, I think the Government—now, I am not saying that they could not have tried it differently and I do not think they could have done anything except get some adjudication by the lower court, because, after all, when the Supreme Court said that on the basis of the matter as it existed it was not in a position to make a final judgment, it was merely delineating what was to be done if certain facts were shown and had to have an adjudication by the lower court.

The Court: Then after the lower court found, following Mr. Justice Jackson's opinion, that the Indian was entitled to the allotment, the Government appealed to the Circuit Court?

Mr. Brett: That is right.

The Court: And that court affirmed the award of the allotment, and then the Government peti-

tioned for certiorari again—not again, but petitioned the Supreme Court for certiorari?

Mr. Brett: The first statement is absolutely correct. The second statement is only partially correct, in this: The petition for certiorari was by Mr. Arenas and the Government filed merely a conditional petition, saying that if the court did grant it, then it wanted to present certain [465] facts for the Circuit Court to review.

The Court: It was in the nature of a conditional cross-petition?

Mr. Brett: That is correct, your Honor.

Now, if the court please, I want to again get back to this point. The word “justice” is a very important word, one of great disputation, but it is not one in which we can be too dogmatic or which we can too ably define.

I think we all sincerely want justice in this case, as in other cases. To my mind, if the court please—perhaps I am persuaded by my training—to my mind, the gravest possible injustice is to attempt it upon the basis of sympathy and inclination and desire, contrary to the law.

The Court: Of course, sympathy does not have any effect here. I just wanted to hear, and you have made the answer, of the Government’s explanation of the delay up until the time of the decision.

Now, I would like to ask you if the Government has an explanation for this situation: The law in effect says, I think, without any question, that if the Secretary of Interior does not do his duty and make

an allotment, that the Indian has a right to sue and invoke the jurisdiction of this court to get an allotment; and that is what Arenas did. In order to do that he had to employ counsel.

Let us assume that the Secretary of the Interior misconceived [466] the law up until the time it was settled in the Arenas case. There is no misconception on his part now of the law, I take it; there is no misconception of his part now that these attorneys rendered the services which shed the light, so to speak, as to the law in these matters; and there is no misconception on his part but what Arenas is indebted to these attorneys for their services.

As I understand the statute, the Secretary is in position to make necessary provision so that Arenas could, if so advised, compensate his attorneys. It is my understanding that the Secretary takes the position that these attorneys are not entitled to one penny out of the land and monies the Secretary holds in trust for Lee Arenas. Am I in error there?

Mr. Brett: Well, your Honor, I feel that you are. In the first place——

The Court: In what particular?

Mr. Brett: Well, in this particular: In the first place, I do not believe that there has ever been a suggestion by counsel—if there is any, it has not been brought out in evidence, and Mr. Arenas and his wife are here, and I have not been able to find out from them, that a figure of any kind or character——

The Court: I am not speaking of figures. It does not get to figures. My assumption is that the Secre-

tary takes [467] the position that, no matter the figures, these petitioners are not entitled to one red penny from the assets of Lee Arenas held in trust by the Secretary of the Interior of the United States. That is my understanding of the Government's position here. I want to know if I am in error.

Mr. Brett: Well, again, I cannot answer until I have a definition; and I am not evading. If your Honor means this: That the Secretary believes, as I believe, that this property at the present time is still a part of the public domain; that by the existing Acts of Congress neither Lee Arenas nor anyone for him, nor any other person has the power or authority to either alienate it or to affix a lien upon it or to in anywise use it to pay attorney fees or anything else, then I would say that the answer is yes.

If you mean, however, has the Secretary predetermined that if this court, in the exercise of its jurisdiction and after hearing this evidence, has fixed some award, that the Secretary will not cooperate to find some manner in which the award can lawfully be paid or, putting it the other way, will actively cooperate with Mr. Arenas to prevent the payment of the award, then I feel, if the court please, that there is no basis for such a conclusion; that there is no evidence to support it; and that it does violence to the ordinary rule that we will presume, at least, that officials will act in good faith, will exercise their best judgment [468] and will be innocent of wrong.

The Court: Now you are misunderstanding me entirely, I think.

Mr. Brett: I am not.

The Court: I want to know what your position is as to what the Secretary's view is—not with respect to what will happen if a judgment is rendered, but what his position is now at the bar, before judgment. Is it that these attorneys are not entitled to one red penny of lands or funds held by the United States of America in trust for Lee Arenas? Do I understand that correctly?

Mr. Brett: Now that you have defined it in that way, I would say this: Not that the attorneys are not entitled to be paid, but that they are not entitled, as you said—and I try to repeat it aptly—one red penny of any monies which the Government holds in trust, nor to any interest in the lands which the Government holds in trust, because there has been no consent by the United States in any form or manner that it should be surcharged.

The Court: Of course, the United States is the adversary. Is it to be supposed, or does the Secretary contend that Congress provided this remedy for the Indians, this remedy in the courts, knowing that to achieve a remedy in the courts the allottee must have a lawyer, and knowing the maze of legal difficulties in the Indian affairs, that [469] Congress provided a remedy for the Indians and made it so hollow that he could not hire a lawyer and pay him out of the recovery?

Mr. Brett: Well, now, if the court please, I would answer that in this way: In the first place,

I think—I see that in the main you are following the suggestion of Judge Preston—but I think that——

The Court: I am not following anyone's suggestion about it. These are questions in my mind.

Mr. Brett: I see. I will endeavor to answer them in this way:——

The Court: As I understand the law, and I want to be sure we are talking about the same thing.

Mr. Brett: That is right.

The Court: It is not easy to wade through all these statutes; it is not for me. It is a hodge-podge. We not only have the exceptions in the statutes but we have the exceptions of the tribes and the exceptions of the circumstances and exceptions upon exceptions in the statutes.

Mr. Brett: That is true, your Honor.

The Court: And that requires skill, I think. It seems to me so, to wade through these.

As I understand it, the Secretary of the Interior today, if he so desires, could release Lee Arenas' land from this trust to the same effect as if the President of the United [470] States had said so. Am I correct in that?

Mr. Brett: That is true.

The Court: He can release all or any portion of it?

Mr. Brett: That is true.

The Court: Which is to say, he can make all or any portion of them free and clear and available for Lee Arenas to pay what he owes, if he so desires.

Mr. Brett: That is true.

The Court: In the same way, of course, he can under Section 403 of Title 25—that authority I am referring to, I take it, is contained in Section 404 of Title 25.

Mr. Brett: Just a moment, if the Court please.

The Court: Dealing with the sale, on the petition of allottee, of the res?

Mr. Brett: I think that authority is contained in Section 392 more specifically, but I will have to look at them.

The Court: Yes; you are correct. 392 specifically covers it.

Mr. Brett: Yes, sir.

The Court: That is the Section I was hunting for.

Mr. Brett: That is right.

The Court: Then follows such sections as 403, dealing with leases; and, as I read the Section 403, the allottee may give a lease up to five years and take all the proceeds. [471]

Mr. Brett: That is correct.

The Court: Now, an allottee is entitled to occupy the allotted land.

Mr. Brett: That is correct.

The Court: Is that his legal right?

Mr. Brett: Yes, sir.

The Court: If he is entitled to occupy the allotted land, is he entitled to the use and occupation of it?

Mr. Brett: For certain purposes.

The Court: Namely, the rents, issues and profits of it?

Mr. Brett: For certain purposes only; yes, sir; for the purposes of farming or for the purposes of residence. He may also, under regulations which are permitted by another Act, have a limited right of use for business purposes which are subject, however, to control of the Secretary of Interior; and, as I stated yesterday, he is limited to the extent that whatever transaction of that character is made is subject to a 30-day revocation clause under present existing regulations.

In other words, we give a five-year lease, by name, but actually, the lease is required mandatorily to contain a provision that it may be terminated at any time upon the discretion of the Commissioner of Indian Affairs or the Secretary on 30 days' notice.

The Court: Wouldn't it be strange law, in your opinion, [472] that the adversary in litigation would withhold the rewards of the litigation and could, even if unsuccessful for him, at the conclusion of it prevent anyone from using the reward of the litigation for the purpose of defraying the expenses of it?

Mr. Brett: No; I would not say it would be strange law. I would say I would agree that it may, perhaps, be regarded as being stringent, but it is not strange. And let me point out why I say it is not strange.

It is axiomatic, if the court please, not only in this court but in all courts, that so far as a sovereign is concerned—and we are dealing here with

the sovereign's property; this property is still public domain.

The Court: In trust.

Mr. Brett: The trust patent, by all of the constructions that have been made by the Supreme Court, is nothing more than a mere statement. The Court has said it is a piece of paper; that if certain conditions subsequently to occur, the Government will do certain things, but reserves to the Government—

The Court: The Government does not claim any equitable title in these lands, does it?

Mr. Brett: Sir, the Government claims all the title in the land subject only to this: That if in the discretion of the officer, at a later date it is decided to transfer the land unrestricted, it will be transferred. [473]

That is so stringent, if the court please, that we have a most unusual situation that I do not know of it in any other branch of law with regard to realty. It is so stringent that even if the United States, by the Presidential signature and with the United States Seal, gives a complete unrestricted patent to the Indian, so long as he remains a member of the tribe and so long as the property remains vested in the Indian, Congress may at its discretion and without violating the Constitution reimpose either the same restrictions, additional restrictions or any restriction.

In other words, it is Government domain. It is on that basis that the United States Supreme Court, in the case of *Minnesota vs. United States*, decided

that it was public domain and was not subject to the law of eminent domain, not subject to the use of eminent domain by the state because it was the public domain.

Your Honor asked if it was not strange, and the reason I——

The Court: Would you say that Congress could constitutionally take this land that belongs to the Mission Indians and give that to the Crees?

Mr. Brett: Absolutely, yes, sir. I see the Indians here and I do not want to be quoted in the Palm Springs paper as saying there is any such intention. You are asking [474] me can they do it?

The Court: Yes.

Mr. Brett: It is my opinion, if the court please, that Congress tomorrow could do just what is to be proposed to do in the Butler Act, although I do not think, personally, the Butler Act will go through—could take every inch of that ground, including Lee Arenas' land, and transfer it by public sale or in some other form, and turn over some other lands to these Indians.

The Court: After declaring a trust for this tribe of Indians?

Mr. Brett: Yes, sir. Not only can Congress do it but Congress has done it in the past. Congress has removed the Indians from one place to another.

The Court: Yes. And after declaring a trust for a particular tribe, then take it away from the tribe later?

Mr. Brett: That difficulty is, if the court please, that that statement of "declaring a trust", just like

the declaring of a patent which was referred to in *United States vs. Jackson*, is a rather unapt term. It is not a declaration of trust, as I understand it, where the trustee's powers are almost entirely in his discretion and the beneficiary has the extremely limited right, the only right that is vouchsafed the so-called beneficiary in this case, that under limited conditions they can get what is called a [475] so-called trust patent, and even when they get that, their rights are so strictly limited there is very little, as your Honor pointed out yesterday, that could be done on it. You can't borrow on it; you can't sell it. You can only make limited use of it, and it is extremely restricted from any beneficial interest, if it rises to that. Some courts have said that it does, but, as I say, I think it is a very unapt definition.

The Court: An allottee has some interest, hasn't he?

Mr. Brett: He has an interest to this extent only, if the court please: He has an interest that would be exclusive of someone else who is not entitled to an allotment.

The Court: He has an equitable interest to enforce the allotment, doesn't he?

Mr. Brett: Oh, yes; he has that interest.

The Court: And this is an equitable proceeding, I take it, without any question, and Lee Arenas comes in and invokes the equitable jurisdiction of this court under Section 345 of Title 25.

Mr. Brett: Your Honor, of course, realizes that I take a different view, and I may be in error.

The Court: Have you considered the cases cited

by Mr. Justice Jackson on page 430 of 322 U. S., of *Hy-Yu-Tse-Mil-Kin vs. Smith*, 194 U. S. 401, and *United States vs. Payne*, 264 U. S. 446? [476]

Mr. Brett: I think I have; yes, sir.

The Court: Those cases were cases under that Section and the question was not there, but it is implicit, isn't it, throughout the opinion that the court is dealing with a decree, which is an instrument of a court of equity, and that the whole nature of the proceeding is not legally in the sense of an action at law but purely equitable in nature?

Mr. Brett: That is true.

The Court: And the very action to declare this allotment is equitable in its nature, isn't it?

Mr. Brett: Well, your Honor, it would not be of any particular profit for me to repeat I do not think so, but your Honor has held that way and therefore I am trying the lawsuit on that theory as far as this court is concerned. Let me get back just a moment. Your Honor a while ago referred to strange condition. First, let us examine it in the light of other situations which are at least somewhat similar.

The Court: Wouldn't it be equivalent—before you proceed to do that, I just want to interrupt a moment. When I say “strange”, wouldn't it be equivalent and so to hold, to hold that the Secretary who loses a lawsuit under a Section 345, Title 25, he loses a lawsuit and he doesn't like it, so he says: “We won't pay the lawyers. I hold all the money.” Isn't it just in effect repealing Section 345 as [477] a practical matter?

Mr. Brett: I do not think so.

The Court: If the court should say to the Bar of this country: No matter how many times you go to the aid of an Indian under Section 345, unless the Indian himself, apart from the Secretary of Interior—which is unlikely—has some funds of his own, you shall not be paid and cannot be paid without the consent of your adversary to the litigation?

Mr. Brett: Your Honor, I agree that that seems harsh at first glance, but let me review it with you in this respect: As I pointed out in the brief, the considered judgment of Congress throughout, although it has vascillated in many ways, has been that these Indians need the protection to such an extent that when the property is finally turned over to them they will know how to take care of it properly. And I realize that that may seem long, but to me there is that purpose, that it be turned over to them completely free and clear of any encumbrances or any transactions which will change the character of it so they will not get the whole that is intended for them.

Let me just indicate one thing: That a decision such as you have just indicated here has been asked and the man, Judge Preston, has frequently adverted to the fact—which is not applicable here, fortunately, but is applicable in many instances to the United States—that when the United [478] States comes into court it is an ordinary actor like everybody else and is subject to the ordinary jurisdiction and is subject to everything that any ordinary litigant is, and that is fair and is proper.

We have numerous problems down in Palm Springs there which we have been very hesitant to touch upon in view of this situation which we have been facing. We saw it when we wrote our briefs, and the Circuit Court said: No; you will just simply bring something in that is not in the case. There isn't any indication, as evidence in this case, that they are going to try to reach any property of the United States; and I think probably they were actuated by the fact that the contract specifically said, in language, that the attorneys were not looking to anything that was property of the United States or income from the United States.

But let us just see what would happen if, by chance, your Honor would make the decision that is asked here and it should be affirmed. These Indians, as I have said, have heretofore been and are now the subject of many, many attempts to victimize them out of property and property rights. Not all lawyers, not all agents, and not everyone dealing with those Indians are of the high moral character of the petitioners in this case, whom I admire very greatly.

It would mean this, if the court please: That the moment I would come in, that is, that the United States would [479] come in here and seek any relief in connection with that reservation, thereafter we are putting ourselves on the plane with anyone else's attorneys. And the lawyers say: Well, here we have to defend these Indians; they have no money; so we made a contract with the Indians, and we figured that if we could defend them that they

would get such and such, and then the court would have that same power that is asked here. If you have the power at all, you have the right to use it to its fullest extent to aid indirectly——

The Court: The court would not award any improvident amount, you do not assume, do you?

Mr. Brett: Irrespective of whether you award an improvident amount or what you award, you would be doing indirectly what Congress, as a matter of policy, has said should not be done; you would be taking that land and distributing it in due course to other parties than the Indians.

The Court: Well, Mr. Brett, you have said here not only in this case but in that Belardo case which you tried, that as far as you can see there is nothing to prevent all these Indians, under that Statute, from going and standing on a piece of land and saying: "I choose this and I want it allotted to me as my fair and equitable share of the tribal property pursuant to the Statute," and asking the Secretary of the Interior to make that allotment.

Now, experience has shown that he won't make it, very [480] likely; that he will have to be forced by the courts, pursuant to Section 345, to make it; and that is what Congress said was the Indians' recourse.

Now, as a practical matter, what lawyer would take the case if it is said to be the law that a court of equity, having assumed jurisdiction of the res for the purpose of doing a very drastic act with respect to it—this court has in the Arenas case picked

up certain parcels of tribal property and said, "Those go to Lee Arenas," hasn't it?

Mr. Brett: That is right, except that it is only——

The Court: All right. Having that jurisdiction of that land to say that, would not a court of equity have jurisdiction of this fund, if you please, the res, for the purpose of charging it with the costs of that recovery by Lee Arenas?

Mr. Brett: No, your Honor, because—in the first place, I said, "Yes," but I did not want to interrupt your Honor. But I have to modify my affirmative answer. All that the United States has consented to, all that the court could possibly have said under its jurisdiction—because, no matter what it says, the court can't have a judgment that goes beyond its jurisdiction. I think that would be conceded. Now, all the jurisdiction that is granted under Section 345 is that the decree shall have the same effect as if the Secretary had approved the allotment. [481]

That does not mean that the decree gives Lee Arenas the right which Congress has said he can have or any other Indian can have, until the President or the Secretary of the Interior gets to the point where they feel it should be granted, and that is a restricted fee title. All that he could possibly get and all that this series of judicial decrees can give him is the effect of a trust patent.

As a matter of fact, if the court please, as I pointed out in my brief, these attorneys have not even procured that for him, because the Section does not say that he gets a trust patent. It says it

is the same as the approval of an allotment. They still have not applied for the patent. The patent still has not been issued. I verified that.

The Court: They may want to know whether they are going to be paid up to this point before they have to mandamus the Secretary of Interior, perhaps, to issue a trust patent.

Mr. Brett: May I continue just one moment?

The Court: I appreciate all the probable improvidence on the part of the Indian, but the court is supposed to protect against that.

If you take the other view, that the court has no power, having jurisdiction over this property for the purpose of making an allotment out of tribal lands, has no jurisdiction to charge it with the costs of doing so——

Mr. Brett: Precisely. [482]

The Court: ——which is an inherent judicial power of a court of equity, then where will the Indians—take the Palm Springs Indians, alone, who are faced, as you say, with considerable litigation involving their properties down there—where are they to get representation?

Mr. Brett: Well, if the court please, I would answer you directly this way:——

The Court: Before you answer me, let us take the morning recess and give the reporter a little relief.

Mr. Brett: Yes, surely.

The Court: Five minutes.

(Short recess.)

The Court: I was detained in chambers, gentlemen. I am sorry to have kept you.

Mr. Brett: I wonder if the reporter could read me your Honor's inquiry? I think I have it in my mind, but I would like to be sure. I am hoping in due course, your Honor, that I can get down to what I have in the way of a main argument, but I am going to endeavor as far as I can to answer.

The Court: You may delay that if you want to.

Mr. Brett: No. I am going to answer it right now.

The Court: I never intended to proceed past the point of hearing whatever explanation was to be made on behalf of the Secretary of Interior for his position in the matter adversary to the petitioners.

Mr. Brett: I am going to endeavor to answer that. Your Honor can realize, of course, that this is a broad subject and it is not always easy to answer some of the questions. I would answer you this way:

The Court: There is no sentiment in the situation that ordinarily arises in an equity case where someone sues and recovers a fund, as to charging the fund with the costs. Courts of equity have always charged the fund with the cost of the recovery; isn't that true?

Mr. Brett: But that is not true in this case.

The Court: That is my question: Why isn't it true here?

Mr. Brett: All right. It is not true in this case for this reason, if the court please: In the first place, there is no res that is in the hands of the

court or to be administered by the court. The only thing that the United States has consented to by Title 25, Section 345, is a form of special proceeding, perhaps you would say, in personam between the Indian litigant—and he is the only one who can be the litigant as plaintiff—and the United States to determine one fact only, and that is, have such acts and circumstances arisen that entitle him to an allotment.

Now, just let me expand that further. This court, even despite the decision that has been made here, does not have before it and has no jurisdiction over either the United States [484] or the Secretary of the Interior, for example, to enforce the issuance of that patent.

Now, I do not mean by that that no United States District Court has. I mean, which has the instant venue in this proceeding, hasn't that. But if there is, assuming that which I think is a violent assumption, because I think, upon application, the patent will be issued, but this court, nevertheless, if the Secretary should arbitrarily or virtually say: Well, despite all this matter of judicial action that has been taken, I am not going to issue it, his official residence is in Washington, D. C. and the only jurisdiction that exists to enforce the issuance of the patent is in the forum in that jurisdiction at Washington, D. C. There is nothing else that this court may do with reference to the property because this court has no jurisdiction of the property.

The Court: Has not this court, as between Lee Arenas and the other members of the tribe, reached

the judicial arm down to Palm Springs, if you please, and out of all the tribal lands, said, "Lee Arenas, these are allotted to you"? Has not the court in effect picked up those lands and said, "Lee Arenas, these are allotted to you as between you and all other members of the Palm Springs Band"?

Mr. Brett: I do not think so, your Honor.

The Court: And in that sense has not the court acted [485] in rem?

Mr. Brett: I do not think so. I do not think that this judgment is justicative in any respect as to other Indians of that tribe. I think all that this court could do and all that this court has done is said: As between Lee Arenas and the United States, that conditions precedent have been performed so that this Indian is entitled to an allotment. And the situation exists the same as if the Secretary, who had the authority and the duty to determine those facts, had made those determinations, and stops right there.

And I think that if there is any other remedy, equitable or legal, that the best language I could give you is the Circuit Court of this particular Circuit in the Eastman case, where there was sought from this same District Court equitable remedies by way of injunction from interference with an allotment. It said this—I have quoted it in my brief:

"The trial court thought that leave to sue the United States is found in the Act of August 15, 1894, as amended, 25 U. S. C. A. Section 345. We are not able to agree. It is plain from the whole

Statute that Congress intended merely to authorize suits to compel the making of allotments in the first instance. Here the allotments have [486] already been made. Should the view taken below be approved and the scope of the Statute thus enlarged by judicial construction the Government may find itself plagued with suits of Indians dissatisfied with the administration of their individual holdings. Enlargement of the right to sue the Government for the redress of grievances of this character is solely a function of Congress. * * * ”

Now, I think, if the court please, that this exactly relates to the remedy; that the remedy here resides in reference to these petitioners, if Congress has given an inefficient or insufficient remedy, Congress is the only locality, it is the only authority that has the power to give additional remedy. And I think that it is properly so, and I would like just merely to add this, and then I will go to the main phase of my argument.

Let us assume, if the court please, that this reasoning that has been urged here is sound; let us assume that despite the fact that Congress has said at this time that unless an executive of the United States, to-wit, the President or one of its chief executive officers, to-wit, the Secretary of Interior, in their discretion shall determine that an Indian shall have more than just the right to occupy and a limited right to use—which is a trust patent—that there is vested in the Indian the power, directly or indirectly, to make arrangements with counsel or with anybody else in the assertion of just rights, if

you please, the result of which ultimately will be this: That it will be paramount to or supersede the discretion and judgment of those whom Congress has entrusted with that authority, and will seize these lands and will not give them as Congress has said they shall be given, merely in the form of a trust patent, once released by trust officers, but would give it to them in fee, because that would be the ultimate result.

On this rule of law that is here sought upon the theory that there is some equity that justifies it—and I will endeavor later to show that there is not in this case—but if it be said that there is such a rule and that this court has this jurisdiction, there is nothing whatsoever, as I see it, to prevent this following: That those who may be so minded may negotiate with the remainder of the Indians, deal with them as they may desire. It is true they will be subject to the court's approval as to percentages, but percentages are not important, whether it is 10 per cent, 25 per cent, or one-third as here requested.

The Court: Do you mean that?

Mr. Brett: Sir?

The Court: Do you mean that percentage is not important?

Mr. Brett: I mean that a percentage is not important to [488] what I am now going to urge. In due course the net result would be this: Not that these Indians, if the court please, would get trust patents, but that these Indians would get partial trust patents to a part of the property and other people would get fee patents, because that is the

ultimate result of saying that this court or any court has the power by virtue of the fact that the Indian contracts and by virtue of the additional fact that despite the law which says that he can't sell or alienate his land, but because he has no other assets that he can then indirectly and circuitously make an arrangement through which the court can do what he cannot do, to-wit, free the lands of these restrictions and turn them over to other private owners.

I submit to you that once we establish that theory the rest follows, and it will follow without any question in due course. And some percentage, whether it is 10 per cent or 25 per cent or one-third, or whatever might be the determination of the respective judicial officers upon the representations made, the 60 Indians which compose this tribe will not get the lands that are set aside there to actually be transferred to them, but they will get only a part of those lands, and the remainder of those lands will be freed from trusts and will get into white hands or into some other ownership.

The Court: Let us test that just a moment. The only [489] suggestion here, irrespective of the arrangement the Indian makes with the attorney, is for the court of equity to make an award out of a fund recovered. The arrangement made between the Indian and the lawyer has no bearing, except it might be the point if a court of equity were inclined to award more as a reasonable fee that it would be an upper limit, certainly not a lower limit.

The only case in which an award would be made under the theory urged here by the petitioners is a

case in which an Indian has sued the Secretary of the Interior and the court has found that the Secretary of the Interior did not do his legal duty.

Now, are you suggesting that the Secretary of the Interior is going to continue not to do his legal duty and that these Indians will have to sue and will recover? It presupposes success in the courts they will recover, and for that reason they will lose a part of their inheritance, so to speak, or their tribal rights.

Mr. Brett: If the court please, that is not the gist of this action. The gist of this—not of this “action”—I should say of this theory that is here espoused is this: The Indian, being an indigent and having no other means, has to have a lawyer to protect his rights, whether it is either to safeguard them, to get them back, or to defend them; that by virtue of that fact it is contended here that there [490] is a rule of equity that if the lawyer has to rely upon that victory and is successful and brings into the court for the benefit of the Indian, or defends the Indian—because those same rules apply to defense as well as an affirmative right—then there is a charge legally that is available.

The Court: Courts of equity have always imposed it. In the Ticonic Bank case there was no arrangement at all. There was no showing but what he might have been a millionaire, he might have been able to pay the fee, but the court said it was only equitable to charge that fund with the costs of his recovery.

Mr. Brett: I realize that.

The Court: That is the theory, isn't it?

Mr. Brett: I realize that. Now, let me just make the answer to what you said a moment ago. It would not only be if Indians were forced to appeal under 345. Let us suppose that the Department of Justice, in behalf of the United States, for the Commissioner of Indian Affairs brought an action upon the theory that an Indian was exceeding certain rights that he had under his trust patent; let us assume, for example, that the Indian has done, as many of them are doing because we are still confronted with this litigation and we do not know just what way to jump, and they make 25-year leases to people, which are absolutely illegal, but [491] the Indian, however, makes them; he receives some funds; and let us suppose we attack it and the Indian says: "Now, wait. I am getting an income from that. I want to protect that right." So he goes to a lawyer. The lawyer says, "Well, all right; under the rule that is now established, if I succeed for you, I will be able to establish to the court that I am bringing about certain results favorable to you and then the court can award me a lien upon this and in due course I can get part of this property sold."

The Court: That would mean the Government was wrong, would it not?

Mr. Brett: That is true.

The Court: Would there be any harm in such cases of providing thus a means for an Indian to defend himself against the wrongful acts of his government?

Mr. Brett: I can't say "that is true." I can only

say, if the court please, that the law I have found does not accord; that the law is to the effect that if a particular act is illegal or against public policy, then the court cannot supplement it; and that is what is asked here.

The Court: The Secretary of the Interior takes the position—I am talking about policy now, not law—the policy of the Secretary of Interior is, as I understand it, asserted in this action. I assume that the Secretary would say that these attorneys have earned something; that Lee [492] Arenas owes them something.

Mr. Brett: That is right.

The Court: But he says: I stand here with the legal power to pay them, to give it all, if necessary, to satisfy Lee Arenas' just debts, but I will not give anything. Hasn't Congress said in effect, or hasn't Congress entrusted to the Secretary of Interior the power to enable this Indian to pay a debt of honor and justice; and the Secretary of the Interior, doesn't he say, "I will not perform that duty?" Is there anything left for Congress to do?

Mr. Brett: Yes. Yes, if the court please, because at present Congress has given him that in his discretion. Now, let us distill that argument.

The Court: Mind you, I am not referring to amount.

Mr. Brett: No; I understand that.

The Court: If the Secretary of Interior came into court in this proceeding and said, "Yes; we concede that these attorneys have served Lee Arenas successfully and we will concede he owes

them a reasonable compensation for their labor, but we cannot agree with them as to the amount," that is one thing. But the Secretary of the Interior's position here, as I understand it, is not that. He says: "Ah! Sure, Lee Arenas owes you money, but you are not going to get my help in paying a penny of that."

Mr. Brett: Now, if the court please, will you either [493] indicate to me where in the briefs or where in the pleadings there is any such statement?

The Court: No. But that is what I am inquiring about. Am I in error in the position of the Secretary of Interior here?

Mr. Brett: I think you are. In the first place, of course, I have not inquired and have no reason whatsoever to know. But I will say, without having made specific inquiry, that I have no reason to believe, since the Secretary of Interior, through the Commissioner of Indian Affairs, has allowed Lee Arenas to occupy and use that property—well, ever since Lee has been old enough to do so—without interference, long before the Allotment Act, and since there is an income to be derived from that land, I have no reason whatsoever to believe that if your Honor makes an award, that the Secretary will not, I do not believe, confirm any sale of the property or any lien, unless the Supreme Court ultimately says that we have to. Because I say we feel that we would be violating public policy, and that we are defending not only the Indian but the public rights. But I have no reason whatsoever to believe that if your Honor fixes a sum which, in your opin-

ion, is the just amount to be paid to these attorneys and they have earned fees, that the Secretary will in any way deny it, if you want to use that term, with the Indian or associated with the Indian to [494] prevent him or to aid him from devoting the fees which he would be able to get from the use of this property to pay that judgment. I can't conceive of the Secretary of Interior taking that stand.

The Court: Is not that the position he is taking here?

Mr. Brett: Not at all. We haven't—

The Court: That this court has no right to make any determination at all of the fairness of this fee?

Mr. Brett: Your Honor, if you find that—

The Court: As far as the Secretary of Interior is concerned?

Mr. Brett: Oh, now, that is true. You can't bind the United States, because the United States has not consented to be sued. You can't bind the Secretary of Interior because you do not have jurisdiction over the Secretary of Interior.

I do not believe that any judgment you can make here—I say it sincerely—can bind the United States or can bind the Secretary of Interior. But I do believe—

The Court: Your position is this, isn't it: That if the court renders a judgment and the Secretary of Interior likes it, he may pay it; if he does not like it, he certainly won't pay it unless he has to? Is that a fair statement of the Secretary's position?

Mr. Brett: Well, your Honor, I have no means of answering that affirmatively or to the contrary. I

do not [495] believe, however,—I do not know the present Secretary—but I do not believe that that is the spirit that would move him and that would be the action of the Commissioner of Indian Affairs.

The Court: How can we discuss policy, then, if you do not know what the policy is?

Mr. Brett: I do not think this court can——

The Court: You are arguing considerations of policy.

Mr. Brett: No, your Honor.

The Court: In arguing what the law should be.

Mr. Brett: No; I am not, your Honor. I would like to get down to arguing what the law is and merely research——

The Court: We will go ahead at 1:30.

Mr. Brett: May I just merely answer this before we lose track of it? I do not believe that the Secretary of Interior will willfully and arbitrarily determine that he will not abide by any decision of this court. I do believe that probably if his counsel advise—and I would, of course, be one, but not the only one—that we feel, for example, if your Honor should determine that the 10 per cent provision is not binding, and we feel that under the decision it should be reviewed, he would probably ask it to be reviewed until it is finally determined.

If we feel that the amount which your Honor fixes would be excessive—and it would have to be extremely so because [496] you have very broad discretion—we might possibly review that; and it may be that there will be no review, because I cer-

tainly have great confidence in this court and I think it will be reflected by my stipulation.

The Court: I am not concerned with that. You have said, as I understand it, that there is a great latitude in determining what is the reasonable fee for counsel.

Mr. Brett: That is right; yes, sir.

The Court: During the noon hour I wish you would think of this: If we are to consider policy, should not the court be on the liberal side of what is reasonable? I mean laying aside the question of whether that first contract fixed the limit, the maximum limit; assuming it does not, should not the court be on the upper side of what is reasonable in order to encourage lawyers, in view of the history of this situation, to encourage lawyers to aid these Indians who manifestly need assistance to handle the Secretary of Interior, if policy is to be considered?

Mr. Brett: Your Honor, I will try to answer that.

The Court: Very well. We will recess until 1:30.

(Whereupon, a recess was taken until 1:30 o'clock p.m. of the same day, Tuesday, March 30, 1948.) [497]

Los Angeles, California

Tuesday, March 30, 1948, 1:30 p.m.

Mr. Brett: Your Honor addressed a question to me just before the adjournment. The substance of it was: Didn't I believe that in view of the fact that it appears that the Indians would sorely need legal

assistance, and that at least past developments indicate that that assistance might be rather arduous, and that the obtaining of ultimate compensation might be a considerable problem—I am embellishing your question as I understood it—was it not my opinion that the court arrive at the conclusion as to the compensation, assuming that he did not sustain the position which, in due course, we are going to make, that they had bound themselves by 10 per cent contract, should you not be liberal?

My first inclination, I feel, as a Government official would be not to answer it.

The Court: You do not need to answer it unless you wish. What prompted any question was your statement—and I think it was a very fair one—that we speak of reasonable fees; but that is not a pin-point proposition; it is a range, as you have pointed out, a considerable range in the field of what is a reasonable fee for given legal work, and the court can take a view way down here toward the bottom in range to the low end of the range, or the [498] court can take a view up toward the top end of the range and either one would be correct under that view, would it not?

Mr. Brett: That is correct.

The Court: So my question was, under the circumstances here and as long as we were discussing policy—and I could add to that another ingredient, too, and that is in view of the strong probability already indicated that these petitioners, if they are awarded a fee, will have to contest for it again through the Supreme Court—and laying aside the contract for a moment, the 10 per cent contract, as-

suming that that contract was no longer in force, should not the court make its award toward the upper side of the range of reasonableness rather than toward the lower side? And you do not need to answer it.

Mr. Brett: After consideration, I have decided that I feel I would like to answer it very briefly. We have to some extent, it is true, discussed matters of policy, although I do not believe that matters of policy, as such, have any real place in this case, excepting to these two points: I feel that in justification of the Government's position it was appropriate to inform your Honor that this supposed controversy and supposed abuse was not a one-sided question, and I tried to delineate that.

Secondly, I feel that where one is asking the court to explore into a new field and to, as Mr. Clark put it, adapt the remedy to the circumstances required, as we do [499] in equity, that one of the things to be considered is what would be the ultimate effect of establishing that policy.

The Court: That policy is a proper consideration, is it not——

Mr. Brett: I think it is.

The Court: ——in determining which direction or toward which result a statute should be construed?

Mr. Brett: I think it is.

The Court: One of the considerations would be: If you construe it this way, you will reach this result; is that sound, is that sound policy; isn't that it?

Mr. Brett: That is right.

The Court: Or, another way of saying: Is it just?

Mr. Brett: I think that is appropriate, although, as I was endeavoring later to demonstrate it, I am going to try to make it as succinct as I can when I get to that point. It is the Government's position, and it will be my position for the Government, that this matter of policy has nothing to do with this case; that it is a strict matter of law; that the law is clear and the court has only to follow it.

The Court: You are arguing consideration of
I do not feel, however, that the question the court has given should be answered affirmatively or it should be answered negatively, for this reason: In the matter of fixing fees, I feel that the total of what the court should [500] do should be limited to this particular case and these particular **services**. I mean I think that only goes to something that these attorneys have done in this particular case. The court should view that and, using its best judgment under the circumstances that are delineated, come to its conclusion.

I do not think, however, that this should be utilized in either of these two phases, either to assume adverse action—and, I might say not only adverse action but willfully unjust action on the part of the United States—or to assume that this should be a standard which should invite other similar actions on behalf of Indians and their lawyers. I do not think——

The Court: What I had in mind, I was prompted by your statement this morning to the effect of the dire consequences that would entail, not only in this

matter but in the cases of other Indians, if the court should adopt the rule or the construction of the Statute asked for by the petitioners here.

Mr. Brett: I will endeavor——

The Court: I do not suppose we could close our eyes to the consequences of any rule, could we?

Mr. Brett: I do not think, if the court please, that we can fairly at this time assume dire consequences on behalf of the petitioners. [501]

The Court: Didn't you say this morning that if I should follow the road outlined by the petitioners, that other Indians would become involved with lawyers and lose part of their tribal territory?

Mr. Brett: Oh, I did not understand your Honor's comment. I do sincerely say that, and that is the reason I do say that in considering policy and considering that, I felt it was proper. I feel as certain as my name is Brett, if the Court please, if it can be established that there is a power in the judiciary when Indians engage in litigation with the Government, regardless of what may be the merits, because the Government, after all, can guess wrong the same as others——

The Court: But you have to assume the Indians are successful.

Mr. Brett: That is right. But the mere fact that they are successful does not necessarily mean that you would want it said in every single instance involving Indians and the Government that the Government should feel it would have to take its chance on questions that are very debatable; that the Government would have to take this chance: Either it

should stand by and let go on what is going on, which might be completely detrimental in fact to the Government and the Indians, as the Government views it, and unlawful, or the chance that they may misconstrue the Act or some court may [502] construe it one way and another reverse it and construe it another, as happened in this case.

And then what they do is place themselves where the Government's supervision is made subject to varying opinions of varying courts—and I am not criticizing them—but we have to recognize that various judges arrive at various views, each of which would result in the ultimate.

The Court: The ultimate what?

Mr. Brett: Well, justice, in the sense that a judgment of course is presumed to be just, but it would not necessarily be just to the Indians, in my opinion, and I do not believe it will be in the considered opinion of this court.

The Court: What is the alternative, Mr. Brett?

Mr. Brett: The property which they are entitled to eventually and which they are to have on a trust patent, that such should be taken from them, and that would be the result of what is being proposed.

The Court: The alternative, then, is that the Indians shall meekly take as being the law anything that the Secretary of the Interior or his subordinates say, isn't that it?

Mr. Brett: No. If your Honor please, there are definite statutes which say that they can make application and have it approved for fees in advance, if it is going to affect governmental lands. [503]

The Court: In litigation such as this?

Mr. Brett: Sir?

The Court: In litigation such as this?

Mr. Brett: In any litigation involving their government lands or government properties there is a specific statute to the effect that you may apply to the Office of Indian Affairs and have a contract approved. The reason, it is true, that the application was made here, but it is pointed out in that letter which is in evidence, the apparent purport was to say that they were not looking to the Government and did not intend to seek anything from the Government. Therefore, under those circumstances the Indian was *sui generis* and he could make his own contract.

It was pointed out if they did want to seek anything from the Government, then they could modify it and have it approved. It is a common circumstance that goes on, to get such arrangements approved.

Furthermore, I think it is one of the elementary principles, if the court please, in guiding the dealings with this Government that you have to assume that the Government is going to carry out and perform out, and that Government officials are going to act in good faith.

I personally can't conceive of any basis at all to believe that once an ultimate decision that entitles these people to their fees that they are not going to get them. [504] I pointed out there may be ultimate disputes, because there may be valid disputes, but when that is finally settled, I have no reason

whatsoever to believe that they won't pay those fees.

The Court: How long did Wadsworth's allotments lay in the Secretary of Interior's office without any action being taken on it?

Mr. Preston: From 1927 to 1944.

Mr. Brett: That is true.

The Court: 17 years.

Mr. Brett: Now, if the court please, that is not an entirely fair statement, and I am not criticizing it.

The Court: No. I have understood what you have said in defense of the Government's position, and I must say that it puts the Department of the Interior in much better light than its actions have been put in any opinion I have read in connection with these matters of any of the courts.

Mr. Brett: Unfortunately, apparently they did not either bring it home to the court or the Government was not represented in such manner as I think it should have been, but those are the facts.

The Court: But does it conform with our system of fair dealing to say "Yes" to the plaintiff; "yes; you may get the munitions of war with which to litigate the defendant, provided the defendant agrees to give you the munitions of war [505] with which to litigate"?

Mr. Brett: But I can only answer, if the court please, that that is the law and I do not think this court can vary it.

The Court: If that is the law, I would not attempt to vary it.

Mr. Brett: And I think, in other words, as I pointed out earlier this morning, if there is to be redress of that kind, it has to be in Congress, be-

cause what it is coming out of is property of the United States; it is not property of the Indian. You are not now stating: "Have I any means after the Indian gets the property to formulate rules and regulations so that it will be controlled, or to have it so it will be received for him and controlled."

That is not the argument. The question is: Is there any means whereby I can by mandate—because, if you can't by mandate, there would not be any use making the order, if you can't enforce it—is there any manner in which I can make an order against the United States which I can enforce, which will require the United States to do what I say? Now, that, we say, you cannot do in this proceeding.

As to what you can do with respect to Mr. Arenas or those who succeed under him, and with respect to that which he has to get, there is no issue. I do not think there is any question but that is before the court and within your power and authority. But I do say I have been unable to [506] find any law that gives you any slightest authority to give an order which will be binding upon and which this court can enforce upon and against the United States.

The Court: In *The Equitable Trust* case there is certainly dictum to that effect, isn't there?

Mr. Brett: No, your Honor. I think I endeavored to explain that in the brief, but I will make it just as explicit and succinct as I can.

The Court: I have read the brief.

Mr. Brett: I know, but I want to make it a little

clearer in view of what Judge Preston said. In *The Equitable Trust* case it is true there is a reference where we might assume that this fund is just the same as if it had been the land, but *The Equitable Trust* case, in the last analysis, went on one point and one point only, and that was that *The Equitable Trust* action, when it was commenced, was commenced against the property which the United States had completely released and which was in privately controlled hands. In *The Equitable* case the United States, of its own will, interceded to come in, not as the defendant, but as the plaintiff, as a co-plaintiff, as an intervening plaintiff, and by its own terms and by express conditions, said that it wanted to come in with the understanding, first, that the funds would be applied to paying the fees of these attorneys; and second, that certain orders, equitable [507] orders be made with reference to the distribution of the rest of the fund.

That is the distinguishing feature of *The Equitable Trust Company* case and the only thing that controlled *The Equitable Trust Company* case; and it is the basis, if the court please, under which those decisions that you referred to this morning did refer to. In other words, those decisions did refer to certain equitable relief, although those decisions were not, strictly speaking, matters of this character.

The Court: Those were actions under Section 345, Title 25.

Mr. Brett: That is right; but all the Circuit Court did was to refer to certain equitable considerations in those decisions.

In the Anglin case—Judge Preston brought that up—the distinguishing feature in the Anglin case is this: The court points out, first, the secretary did not have to be amenable to those. This court could not reach the Secretary. His decisions were discretionary, and he was completely free if he did not want to come into court and seek to have the heirship determined. He did not have to, and it says so verbatim in the decision. And had he done that, this court would have no jurisdiction, and they recognized that, but, they said, the Secretary of Interior did not elect to do [508] that. The Secretary of Interior elected, as a party plaintiff or intervener, to come in and seek a remedy from this court, to have this court determine who the heirs were, to have this court determine how the fund should be managed, etc.; and having done so, he therefore has made the United States amenable to this court. There is no question about that.

If we come into this court as a plaintiff or as an intervener or as someone asking affirmative relief, and ask this court to exercise its jurisdiction in aid of the United States as distinct from defensive relief, as we have all through here, by saying: If the court please, we are not before the court; we do not agree to submit to the jurisdiction, and we are merely pointing out to you that you have no jurisdiction, that is the effect of our argument so far as the United States is concerned.

If we had come in here and asked affirmatively for relief for the United States, there is no question in my mind that then this court would have

jurisdiction such as is being urged; but we do not have it in this proceeding.

The Ticonic case is equally with that. It had nothing to do with Indians, but the whole sum and substance of the Ticonic case is that that was an ordinary equity proceeding. We have had discussed here about the possibility of this proceeding being equitable in its nature. I want to tell [509] you another reason I do not believe it is equitable in its nature.

As I understand the theory of equity, if the court please, equity can only be brought about in behalf of those who do equity, and can only be brought about by those who are in a position that they cannot have said against them that they have violated good faith. I am not saying these petitioners have in this case, but what I am getting at is, under Section 345, Title 25, it is my considered judgment, and therefore I stated to your Honor, that an Indian could come into this court as a member of this tribe, who, the record may show, had violated 50 separate regulations of the Reservation, made by the Secretary of the Interior, who at that time was incarcerated in jail because he was of vile character and had in every way possible done everything he could to defeat the management and control of the Secretary of Interior, and get, if he could show the conditions precedent, to-wit, that he is a member of the Tribe, that he had occupied the property, that he had selected this particular property and that the property which he had selected was unallotted lands of this tribe, I am convinced that this court would

have to say: "Well, I can't help it, Mr. Brett, no matter what evidence you are trying to show in respect to that, I do not care what this Indian has done, he may be the most vile reprobate, he may be completely with [510] unclean hands, he may be wholly iniquitous, he may have ousted someone, but nevertheless, been there in such a way that he now has possession and is entitled to it; the fact remains one, two and three have been proven, and I have no alternative but to decide that the Secretary should have approved this allotment, and that is the decision I am going to make." If it were an equitable proceeding, I submit that that would not be true.

And I do not see any way that you can get around it. Certainly the Act is so clear-cut in the limitation upon the judgment to be rendered, and that is always a matter to be considered when you are seeking equitable power.

This is a case where the Act says specifically that it would have one single effect and no more, and every time that the Act has been referred to that has been the adjudication, and here is the language; it is very simple and succinct. It says this:

"The judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him * * *."

Now, that is all. There is not another thing that the United States has consented to and there is not another thing that should be done. [511]

The Court: The courts are given jurisdiction, to

read the preceding clause: "to try and determine any"—a very broad word "any"—"any action, suit,"—don't we usually refer to suits in equity, to actions at law?—"action, suit, or proceeding arising within their respective jurisdictions involving the right of any person,"—"involving," another broad word—"including the right of any person, in whole or in part of Indian blood or descent, to any allotment of land"—

Mr. Brett: That is true, your Honor.

The Court: "under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); * * *"

Mr. Brett: And then it says that the sale——

The Court: Isn't that equitable language, "suits"?

Mr. Brett: No.

The Court: "actions, suits or proceedings"?

Mr. Brett: Your Honor, those are merely descriptive terms that are frequently used, but the ultimate is that the only thing the court can determine is the factual status, and that is all you can determine. It does not even vest this court, as I pointed out this morning, with the jurisdiction which follows equitable relief, and that is to carry out the decree. This court has no jurisdiction to enforce allotment.

The only thing in the world this court can determine [512] is the allotment has the status as if the Secretary approved it. Beyond that you could not go.

Every time this Act has been referred to, in other words, in aid of it to enjoin others from interfering

with it, when it was sought in aid of it to enjoin others from interfering with the use, when it was sought to enjoin others from taking timber from the allotment, when it was sought to enjoin others from taxing the allotment, when it was sought to enjoin enforcement of eminent domain proceedings, in each case the court has said: No; you can't do that; Section 345 gives no such power; no such power is ever given to any court. Then you have to go to Congress. That is the place where you will have to get that right.

These trust patents, as I pointed out, are very unusual things, but they also are not entirely without some benefit.

I do not know whether the court is familiar with these facts, but not only is that property not subject to tax, the income from it is not subject to the income tax. The Indian has the absolute right, in case of any interference with that property, to have the aid of the United States Attorney and the power of the Federal Government to forthwith enforce the restrictions and remove any person who may be interfering with that right. There are many benefits to an Indian. [513]

The Court: What right does he have under your view?

Mr. Brett: And in addition to that, another important right, for example, is this: Many of these Indians are people of very limited means. One very definite assistance that they have had there—I realize it is a hue and cry for the whites, but it is a help to the Indian—is that all of these matters of

restricting their use of the property, of fixing the manner and character of development, etc., in the hands of the City of Palm Springs or the State, that authority is stayed because these properties are the properties of the Indians and because they are subject to the trust patent. So it is not something that is just one-sided and without any benefit.

The Court: I am sure it is for the benefit of the Indian.

Mr. Brett: I think, if the court please, I would like to briefly outline just what the Government's position is in this matter, and then I will be very happy again to answer any questions you desire to make. I want, if possible, to aid the court. I want you to understand, and I think I told you earlier in the very instance of this case, that I am not one who would obstruct any lawyers getting their fees. I am a lawyer. I have practiced longer outside than I have practiced as a representative of the Government, and I probably will be practicing again. But I do firmly [514] believe this, if the court please, that these gentlemen were not neophytes. They are not persons who were misled to their damage. These gentlemen were experienced lawyers. They were not only experienced lawyers generally, but by their own testimony as in the record here, had made a very careful and thorough examination of the law respecting these lands.

Mr. Clark said specifically in the interrogatories that he never gave any trust or circumstance to any hope that the Office of Indian Affairs or the Secretary of Interior or anybody else would approve any-

thing in the way of fees in favor of him; he did not look to them. He looked to his right and to his belief that in some way he could enforce it against their will.

Judge Preston said he was early acquainted with The Equitable Trust Company case and he did not rely upon anything except that; that he thought that was a means he could get.

Mr. Sallee was well qualified in this Indian law.

There is considerable complaint. They say why should not the Indian have a right that a white person has. I submit to you, if this were a white person, under settled law in California affecting these matters, they would not have any lien at all or there is no way they could enforce a lien. [515]

The Court: No question of a lien of attorneys here; it is not involved.

Mr. Brett: It is on charging the lien we are arguing here.

The Court: What is involved here is the taxation of costs between attorney and client under the old equity rule of jurisdiction.

Mr. Brett: But I submit, if the court please, that that would not apply in favor of a white person in California, certainly not, as Mr. Taheny stated, since the rule was established in the Erie case and the subsequent cases that brought equity within the same rule as the law.

The Court: But the courts all, every day, charge funds, charge against recovery.

Mr. Brett: But there is no fund, if the court

please; there is no fund. What fund is there in the hands of this court?

The Court: There is some land in the jurisdiction of the court, I should say, isn't there?

Mr. Brett: No; I do not think so. That is what I am endeavoring to point out to you, that there is no land in the jurisdiction of this court. The land, if the court please, belongs to the United States. Congress has the blanket power to do what it will with it, and it has given it to express agents, and those express agents are two and [516] two only. Apparently, whether it was right or wrong, they did not deem it advisable to charge it to the larger number such as if they had given the right to the judiciary.

The Court: Of course, there is no lien under the law of California here. That is not involved. This court of equity has probably a broader chancery power than is given to any state courts.

Mr. Brett: That is true.

The Court: This court has the power to deal and tax costs, not only between parties, but in chancery, to tax costs between solicitor and client, which is a practice where a fund is in the jurisdiction of the court. It is a practice several hundred years old in courts of equity. That is what is invoked here, as I see it. It is a question of whether Section 345 invokes the jurisdiction of the court to that extent.

Mr. Brett: That is true, if the court please, but that is not even exercised as against the sovereign unless the sovereign has made itself amenable to

that right. I do not think you could cite a case——

The Court: If this was a case taking away from the United States of America something that belongs to the Government and explained as public domain, purely and solely in the public interests, it might present a different question I would think.

Mr. Brett: If the court please, in my humble opinion——

The Court: But Lee Arenas is the beneficial owner of this land.

Mr. Brett: May I address a question to the court?

The Court: Yes. Otherwise, if he makes a lease for five years he gets full rental under the Section——

Mr. Brett: He does, providing——

The Court: —as against any other member of the tribe. He has the right of occupancy against all other members of the tribe.

Mr. Brett: But exclusive to him; but exclusive to him. He can't give it to anyone else.

The Court: What is the title, anyhow? Title is just a bundle of rights.

Mr. Brett: That is true.

The Court: And you may have a full bundle and you may have a half bundle and you may have a three-quarter bundle, or any in-between figure between nothing and whole, but it is title.

The United States Government does not claim this land, does it, as against Lee Arenas, except the right to manage it and to hold the title in trust for his use and benefit?

Mr. Brett: Well, I believe that it is implicit, also, that it holds the right at any time that it should elect to do so—and I mean I want to make it clear, because I know [518] we have an audience and we are sometimes misquoted—I have no understanding that there is any such intention—we are all merely talking about power as distinguished from making the use of power.

The Court: Certainly.

Mr. Brett: I think it has the power, and I think it is implicit through the Act of Congress to destroy all of these allotments together and cancel them all out, and I do not think there would be any remedy in anyone.

I think it has the power, to put it further, to **destroy even the trust relationship** in behalf of the property. I do not think it will, but it has the power. It is still public domain.

The Court: This is not treaty land?

Mr. Brett: No; it is not, your Honor.

The Court: If it were treaty land, do you think it would?

Mr. Brett: If it were treaty land, I do not think that it would; no, sir. But it is not treaty land.

The Court: A substitute for treaty land, is it not?

Mr. Brett: Sir?

The Court: A substitute for treaty land, isn't it?

Mr. Brett: No, your Honor.

Mr. Preston: I think, your Honor, if I may interrupt, it is land title to which has already passed out of the [519] United States into the Tribe.

Mr. Brett: No; it is not, your Honor. I introduced the deed in evidence in the Belardo case. The deed is in the United States and is a trust patent in favor of the Indian Tribe, issued by President Cleveland.

The Court: The Government took title to the lands when California was admitted to the Union.

Mr. Brett: That is correct; and I think it acquired certain portions from private ownership.

The Court: Rather, I should say, took title under the Treaty, I suppose, of Guadeloupe Hidalgo?

Mr. Brett: Yes, sir.

The Court: Without consulting the Indians at all, wasn't that so. And then, in order to make things right with the Indians, it being a *fait accompli*, so to speak, the Government declared a trust in the land for the benefit of the Indians, instead of negotiating treaties as it had done heretofore?

Mr. Brett: I think that is right, although I may be wrong. I can't keep everything in my mind. I have a recollection that these Indians were not on this particular land, actually, and were moved to this land.

The Court: I have that same recollection.

Mr. Brett: Yes. I would say, however, that your general statement is correct, that the Government unquestionably acquired its public lands as far as California is [520] concerned under the Treaty of Guadeloupe Hidalgo, without consulting the Indians or anyone else; and that where they were occupied by the Indians, that they did not consult with them as to what they did, excepting that I believe, as a

general practice, they made either arrangements for that land or for alternate land for their use. And then, of course, when the Allotment Acts were written in 1891, provisions were made under certain circumstances for several allotments.

But the point is: This is public domain; this is public land, and this particular formal order, whether you call it a charging lien or what you have, the proper and only method by which it can be effected is as against the United States.

The Court: Mr. Brett, suppose the United States owns other lands under a different character of ownership, as just recently it was decided that the United States owns the submerged lands off the coast here.

Mr. Brett: Yes, sir.

The Court: Suppose Congress passed a statute and said to the Attorney General of the United States, whenever he deems advisable, whenever he deems that compensation is due to some individual who has been hurt by the United States sometime in the past, or some group of individuals, may deed any portion of that land to him free and clear of all [521] encumbrances; do you think that would be constitutional?

Mr. Brett: Oh, I think it would be definitely constitutional.

The Court: It would be constitutional to empower the Congress, without setting up any standards, to delegate its power over the public domain to some official who could do with it as he pleases.

Mr. Brett: Well, now, if the court please, I did not understand that your first question——

The Court: Let us take something that is closer to us, probably, and a little better settled. The Government owns the lands up here in Elk Hills, the Naval Reserve.

Mr. Brett: Yes.

The Court: Suppose the Congress passed a law and said that whenever the Secretary of the Interior, if he meets up with somebody who has been harmed by the Government, may deed him one or more acres of that land, at his sole and own discretion, and may give him in the meantime an income from it, and may permit him to occupy it and make leases on it, etc.; would that be constitutional?

Mr. Brett: Well, I would answer that: At least, I think it would be debatable, but I have no doubt whether that would lay a sufficient foundation.

The Court: The United States could not itself delegate the power to dispose of the public domain, could it; and [522] Congress could not, could it, constitutionally? Would not that be a worse abrogation of power than was involved under NRA?

Mr. Brett: Well, I am trying, your Honor, to think quickly and informatively.

The Court: What I am trying to get back to is this:—it may not be clear what I am driving at— if these Indian lands are really and genuinely a part of the public domain of the United States of America, any enactment of Congress which says that one officer of the Government, an appointed officer in the cabinet, the Secretary of Interior, may give them away, taken them back, rent them, not rent them, give the income from them to the people or

not give it to the people, and may pick the people to whom he gives it, etc., it would be utterly unconstitutional, would it not?

Mr. Brett: Well, the only answer I can say is this: I made a research sometime ago of Title 40, Sections 258(a) to 258(f) in connection with eminent domain, which is part of the Declaration of Taking Statute, which was formulated after there had been some decisions that, because of the finality of the Declaration of Taking there was no manner in which the property could be returned or divested except by an Act of Congress. So they passed Section 258(f), the substance of which is that the United States Attorney General is the agent of Congress who may negotiate and stipulate with [523] owners for revesting of title.

It does not say anything more. It does not fix in there any arrangement. Of course, I think it is implicit in that Section that there has to be some justifiable basis for it. Congress, of course, has a justifiable basis in this matter in this: That it has established the policy of giving to these Indians these lands under certain conditions. It is an outright gift. It is not anything that they had; it is not anything to which they are entitled in the sense that there is a contractual basis or some other basis. If there were, then I submit, if the court please, that the case of *U. S. vs. Jackson* and others which say that it is not unconstitutional to take them back again would not be a proper decision.

The only possible justification of that is that there is no right, as such, that is vested in the Indian

which he can enforce, no contractual right or no other right which gives him a vested interest; but it is the congressional policy of this Government in an endeavor to oversee the affairs of the Indians, to make them self-supporting, to give them an opportunity and an incentive to better themselves, under conditions to give them use of property and ultimately to give them title to the property.

Now, the Congress very frequently entrusts that to agents, and the law is quite clear, if the court please, that [524] when Congress entrusts that to an agent, at his discretion, that the courts have no jurisdiction whatsoever in connection with that. I might cite to your Honor a case that has not been cited before, that I checked since Judge Preston and Mr. Clark suggested that, as I would say, indirectly as a part of this equitable jurisdiction, they ask you, the chancellor, that you mandamus the Secretary; or, as Mr. Clark said, to seize upon the conscience of the Secretary, assume that he could do what ought to be done and required to do it. That, of course, could only be done by what I call mandamus.

In a decision of the United States *ex rel. Roughton v. Ickes*, Secretary of the Interior, 101 Fed. (2d) 248, pages 252 and 253, that express matter is referred to; and the decision is by Mr. Justice Vinson who is now the Chief Justice of the United States Supreme Court. I am not going to take time to read it because we are taking too much time, anyhow. But the gist of it is this: The court points out that where the act is one which is fixed and is the

duty of the officer to do, and a duty to which one is directly entitled, then of course mandamus will lie; but where the right is one which is within the power and authority of the representative of the Government, of the executive officer or the agent, but is to be done at his discretion, there is no power of mandamus to make him act in any particular way or to make him act at all, excepting this: If as an incident [525] of it there is some action to be taken—I mean if there is a duty to do something but not in a specific way—the court may require him to take some action. If he acts arbitrarily or capriciously, the court can avoid the action that he took; but the court may never place itself in his shoes and exert the discretion with which he is entitled to act. That is what you would have to do in this case.

The Court: I do not suppose there would be any dispute about that as a matter of law.

Mr. Brett: Let me put it this way: That was an improper word and I wish to withdraw it. If you decide to follow the suggestion that was made here yesterday, the ultimate result would be that would be what you would have to do, because the only power that is in the Secretary is a discretionary power. It says that he may, in his discretion, do this. He is required to exercise the discretion; he is required to determine whether, under the circumstances that exist in that particular case, it is appropriate and right.

Now, if you order him to do that, you would have to suspend that discretion. You would have to say: Do not exercise your discretion, because then you

would not necessarily effect your remedy. He might exercise it differently than you would feel that he should. You would have to say: Instead of exercising your discretion, you do a specific thing which, in my discretion to act as a chancellor, I believe to be the right and appropriate thing to do.

I believe, if the court please, under that decision of the Circuit Court of Appeals for the District of Columbia, which has rendered most of those decisions because the executive officers reside in Washington, there are numerous decisions cited by Justice Vinson which clearly show that that is the law.

The Court: I do not think there would be any contention to the contrary, Mr. Brett. I would not consider attempting to tell an executive officer of the executive branch of this Government how he should exercise his discretion.

What is asked here, as I understand it, is that this court act upon the land, the land being within the jurisdiction of the court for the purpose of this action. This is a supplemental proceeding in the main action.

I understand the theory of the petitioners is, it being a court of equity and the equity jurisdiction having been invoked for the purpose of making the allotment, that now, the res being in the hands of the court and the part recovered for Lee Arenas—I use “recovered” advisedly, but whatever interest he has had in these lands has been recovered for him in this action and is within the jurisdiction of this court—that this court now tax costs between solicitor and client, if you please, in the old equit-

able tradition, and charge the recovery with the costs of the solicitors. [527]

Mr. Brett: Now, if the court please, that brings me to the question which I asked or requested leave a moment ago to ask. I want to ask a question. I have been giving it serious consideration, and maybe I am not as well grounded as perhaps I think I am.

It has always been my conception that the ultimate a chancellor in equity could do indirectly or, I would say, contrary to the express desire or will of a litigant, could never exceed that which the litigant would have the lawful power and authority to do expressly. In other words, if what was asked to be done was something that the litigant could not expressly do himself, either because he neither had the right, for instance, he did not own the land or the property and therefore could not in any way affect it, or the law stepped in and said that you may not do it, it would be an unlawful offense if you did it, or would be against public policy, it would seem to me that that would be the ultimate limit upon the chancellor. In other words, the chancellor could not do for him or in his name, against him, if you will, but nevertheless, in a sense for him, sort of circuitously that which he could not legally do himself.

The Court: That sounds very plausible, but you stop and consider The Equitable Trust case. Barnett could not touch that money, those bonds, but a court of equity took, ultimately—first, the District Court—what was it, [528] \$150,000?

Mr. Brett: Yes.

The Court: And then the Circuit Court, \$100,000, and the Supreme Court of the United States, \$50,000, when Jackson Barnett could not have taken 50 cents out of it.

Mr. Brett: I think, however, your Honor, the answer to that is this: The United States, of course, was representing Jackson Barnett, just as it represents all of these Indians. The United States does have that authority.

The Court: Your point there is that the Government was there as an active litigant. There, it, itself, invoked the jurisdiction of the court?

Mr. Brett: That is it; and it, itself, asked to do that very thing. I think that, just as the Supreme Court, through Mr. Justice Jackson, said, in determining this one factor that the Secretary has to determine that the Indians in this particular area were qualified to receive allotments, that is, that they had reached that stage of civilization and were able to take care of their affairs, that he did not have to do it by any express writing or express formula; that he could do it by words or by demeanor; and that the same thing would apply with reference to this right of the President or the Secretary of the Interior, as given here under Section 392, to determine that restrictions should either be taken completely off or partially off of these [529] restricted properties.

I think that the Secretary would not have to do it, if the court please, by saying that by reason of the authority vested in me by Title 25, Section 392. He could do it just as effectively, I think, by com-

ing into this court and saying in this court: We desire a certain particular thing in behalf of such an Indian, and in order to assist that thing being done we ask that the court make certain distribution of fees or distribution of property; and I think by invoking that authority of the court, that would then be invoking the authority that is definitely with the Indians.

The Court: Of course, that, to my mind, is the biggest distinction between The Equitable Trust Company case and the case here at bar. Whether it is a determinative distinction is the problem in this case.

Mr. Brett: That is my thought.

The Court: But, whereas there was no basis for sovereign consent to be sued in The Equitable Trust Company case, the court relied for jurisdiction upon the fact that the Government had itself invoked the jurisdiction of the court, and cited the old Siren case and The Thekla case on page 746 of 283 U. S., whereas here the position of the sovereign to consent to be sued is to be found in an Act of Congress, and we must determine what is the content of that [530] consent.

It is usually strictly construed, to be sure. There are cases which always say that the consent of the sovereign to be sued, the statutes are to be strictly construed. There are other cases that say when the consent is given, it must be liberally interpreted in order to effectuate the purposes of it. So, with those guides, we have to determine how far Section 347, Title 25, lets down the bars against action that

binds the sovereign. Isn't that our problem here?

Mr. Brett: Yes; that is right. Now, then, there is this factor to be considered, I think, in connection with that. It is the definite rule of law in all jurisdictions that I know of and it has been squarely held by the United States Supreme Court, that although equity is broad and although equity will endeavor to fill in the gaps, if gaps exist, equity follows the law, and it not only follows the law, but equity will not supplant the law to the extent of giving a remedy where no remedy exists, if the effect of the law is that to give that remedy would be to violate the law.

The Court: Wasn't it Lord Bacon who said that equity is made to uphold the law and not to subvert it or something to that effect?

Mr. Brett: A good case, I think, if the court please, not an Indian case but a case that I think would be helpful, that is not cited heretofore, but I would like your Honor to [531] read, is the case of *Hedges v. County of Dixon*; that is cited in 140 U. S. 183, and I am reading from Law Edition. It is 37 L. Ed. page 1044, and particularly page 1048.

The gist of this action was this: That certain bonds had been voted which were contrary to the Constitution, so they were against public policy and against law, because they were in excess of the amount that could be voted. The plaintiff in this particular action, making a fine showing, as you will see from reading it, of an equity cause of action that was taken, offered to relinquish the amount that was above the excess, and asked equitable relief

to enforce the right of having taxes levied to pay the bonds. It went to the Supreme Court. The court cites a number of authorities, and then I would just like to read this part:

“The principle running through these decisions controls the case under consideration, and clearly establishes that the complainants are not entitled to the relief they seek.”

The relief, incidentally, was equitable in the way of mandamus.

“The fact that the complainants have no remedy at law, arising from the invalidity of the bonds, confers no jurisdiction upon a court of equity to afford them relief. The established rule, although not of universal application, is that equity [532] follows the law, or, as stated in *Magiac v. Thomson*, cited here, ‘that wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle these rights or that situation, but in all such instances the maxim *equitas sequitur legem* is strictly applicable.’

“Where a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce such contract, or in the absence of fraud, accident, or mistake to so modify it as to make it legal and then enforce it. Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of law, and where the transaction, or the contract, is declared void because not

in compliance with express statutory or constitutional provision, a court of equity cannot interpose to give validity to such transaction or contract, or any part thereof. * * *”

Now, let us analyze the situation here. As I pointed out in the brief, the Congress of the United States has said with particular reference to these particular allotments, that while they are in the trust patent stage no one—it [533] does not say any particular one—no one can make any form of contract concerning them that will be either in the form of a lien or that will alienate, that is, transfer them.

That has been upheld against the Government itself in income tax provisions; it has been upheld against the states in tax provisions and in the exercise of eminent domain; and it has been upheld in every form and substance of theory that has been made to enforce any form of execution of judgment against it.

The Sherburne case for the Ninth Circuit is an excellent one, for example. There was no question about equity there so far as the people being entitled to their money.

The Court: If the petitioners relied upon the contract to give them recovery here, if that was all the basis they had, I would not think they had anything.

Mr. Brett: But can the petitioners, if the court please, come into a court of equity or a court of law and say that we know, as they must have known—they were not only deemed to know but they had

specific knowledge which was given to them by the Commissioner of Indian Affairs in a letter in which he specifically told them verbatim that if you are trying to reach the United States property or any part of it, you can't do it, one of the exhibits in evidence—we presume that these men must have read the letter and that they must have understood it; but in addition to that, there [534] was a public law of long standing, and they investigated the law thoroughly. They knew distinctly that that right was proscribed to any Indian; they knew that that right was proscribed to the white man; and they knew that any one of them that violated that was violating the law of this country—period.

By what possible principle of equity——

The Court: It does not matter whether they relied or not, does it? Take *Mrs. Sprague, in Sprague v. Ticonic Bank*; she had no thought at the time she started her litigation, she had no thought of forcing people who were then unknown to her, by forcing in effect the fund of people who were unknown to her to help defray the expense of her litigation. She undoubtedly intended to defray it all until her attorney discovered the result that she had accomplished had benefited these trust funds standing in like circumstances, and hence, equitably, in good conscience, should bear part of the expense. And Mr. Justice Frankfurter, in his very scholarly opinion, in speaking for the Supreme Court, upheld it.

I had in this court a case in which some bond holders brought a suit, a very selfish suit. They had no intention of benefiting anyone but themselves,

but it happened that the litigation benefited all the bond holders and the shareholders, too, in a tremendous amount. And then after the litigation was all over, the attorneys for [535] the plaintiff and the intervening bondholders came in. The bondholders had already paid their lawyers, showing how little they had relied upon having some fund bear the expense, but under the authority of the Ticonic Bank case I felt duty-bound to award those parties their expenses against all the stockholders and bondholders of the corporation who had been so greatly benefited as the result of the litigation.

Mr. Brett: That is true.

The Court: There was no reliance at all, Mr. Brett.

Mr. Brett: If the court please, undoubtedly implicit in the arrangement is this, however, that the parties should not receive benefits and then not pay the equivalent of a reasonable price for getting those benefits. Now, in that particular instance those stockholders, those bondholders, whoever they might have been, out of whose money it actually came, they had the express legal authority. They did not have any restriction upon their authority. They never made that same contract that those attorneys should pay them those monies; so you were only doing in equity that which they should have done.

But the United States is not in that position. The United States does not owe these people anything. The United States never held out to them anything, and the United States has received no benefits from them for which [536] they should pay.

The Court: Don't you imagine that those people who happened to have funds in the savings department or the trust department of that bank, the Ticonic Bank, were shocked to know that they had to stand a share of the expenses of Mrs. Sprague's litigation?

Mr. Brett: I don't doubt that.

The Court: Or about which they had probably never heard?

Mr. Brett: I don't doubt that. And I would say this: There is nothing being taken away from them for which they did not receive any benefit.

The Court: There is nothing being taken away from the United States here, is there?

Mr. Brett: Yes, your Honor.

The Court: Is there any suggestion that there is anything that the United States claims the beneficial ownership of as sovereign being taken away?

Mr. Brett: Well, very definitely. This property still belongs to the United States. It is subject to its control.

The Court: Isn't the situation this: That here is some property in the hands of the trustee and the trustee will not pay, and the petitioners say the fund is in the hands of the court or, rather, the complete disposition of the controversy, having undertaken the disposition of the [537] controversy?

Mr. Brett: Your Honor, if this fund were in the hands of the court, as you say, if this land were in the control of the court, wouldn't it necessarily follow that if someone were seeking to take some of that land, that you could enjoin them; that if some-

one were seeking to take some property from that land, that you could enjoin them; that if someone were seeking to utilize an increment from that land, that you could make some order respecting it? You can't do that. You have no jurisdiction to do that.

The Court: Well, that is a question about how far the United States has consented to be sued under your Section 345, Title 25. That is the whole question here as far as the power of the court to affect an interest in that property is concerned.

Mr. Brett: I do not believe that I can give you any more than I have in the briefs.

The Court: The United States is here in this lawsuit.

Mr. Brett: Yes, sir.

The Court: Arenas is here in this lawsuit.

Mr. Brett: Yes, sir.

The Court: And the land is in the jurisdiction of the court for the purpose of the court acting upon it to the extent of taking it and saying that it is allotted to Lee Arenas. [538]

Mr. Brett: I can't agree that that is true. I do not believe that this court—well, let me state this:—

The Court: The court put Lee Arenas in the relationship of an allottee to this particular land.

Mr. Brett: That is right.

The Court: The United States did not do it.

Mr. Brett: That is right.

The Court: This court said, as to lot so and so Lee Arenas is the allottee.

Mr. Brett: That is correct.

The Court: All right.

Mr. Brett: But all that that gives——

The Court: How do you affect land? You do not bring the land into the courtroom.

Mr. Brett: No; that is true.

The Court: You affect it by changing the relationship of the parties to the land, do you not?

Mr. Brett: Your Honor, may I again ask——

The Court: Before this court rendered a final judgment that was tribal land. After the judgment was rendered the court had placed Lee Arenas in the possession as against all members of the Palm Springs Tribe. He, and he alone, was the allottee of that land; and he, and he alone, was entitled to the occupancy of it, the utility, isn't that true?

Mr. Brett: That is true. [539]

The Court: And the question is: Do those elements, those incidents of jurisdiction, do they carry on to the point of enabling the court to do as it could in other equity cases, complete justice among the parties by taxing costs between solicitor and client as it could if they were private litigants?

I take it there would be no question in your mind if this were just Lee Arenas against John Smith that these petitioners could have the relief they ask for, is there?

Mr. Brett: On the contrary, I do not think in California they could, not even in this court. I think this court would be bound by California law.

The Court: What California law?

Mr. Brett: Sir?

The Court: What California law?

No. 13103

United States
Court of Appeals
for the Ninth Circuit

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Appellants,

VS.

JOHN W. PRESTON, OLIVER O. CLARK and
DAVID D. SALLEE,

Appellees.

Transcript of Record

In Two Volumes

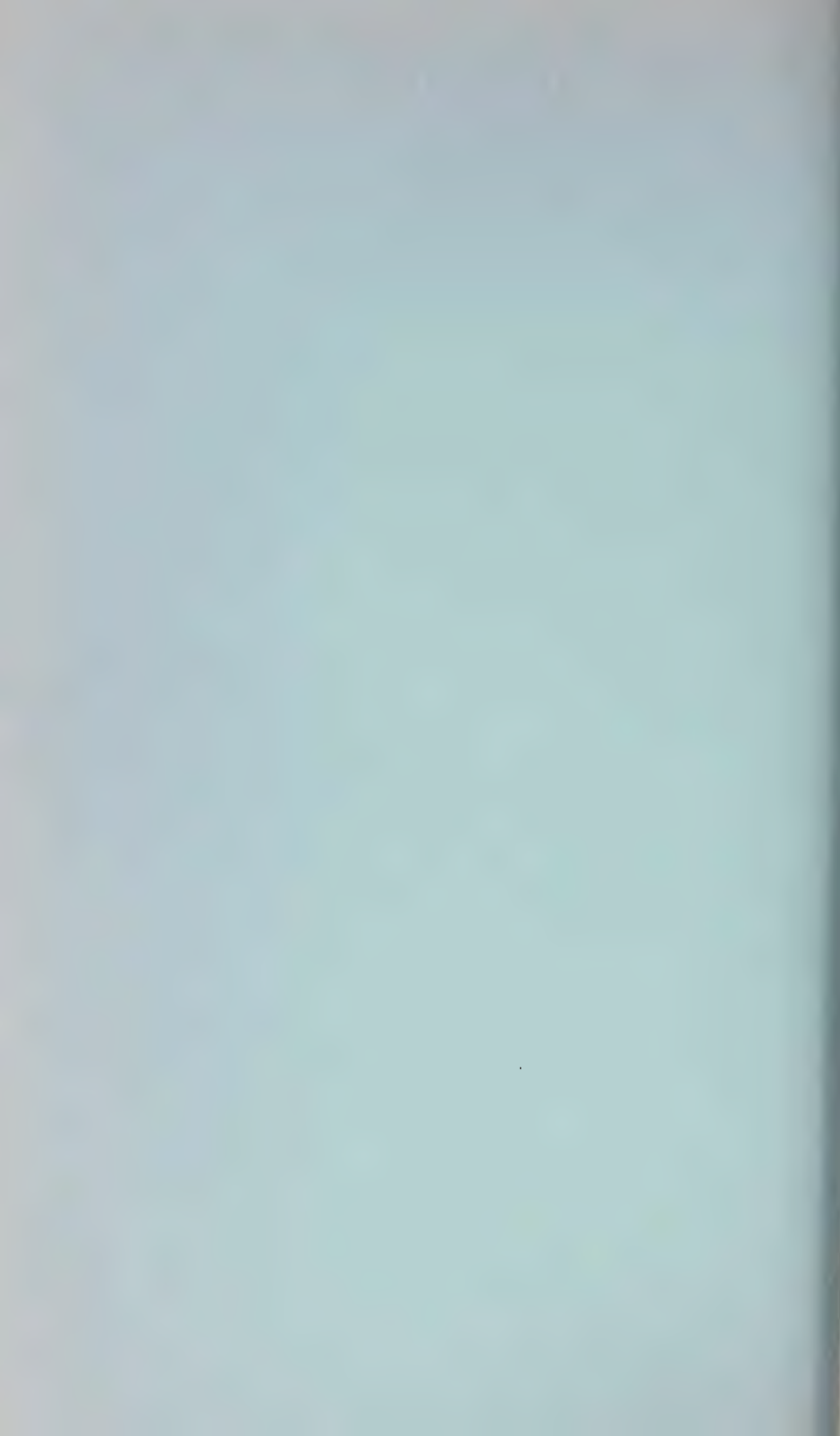
VOLUME II.

(Pages 337 to 659, inclusive)

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Southern District of California, Central Division

FILED

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Mr. Brett: That attorneys performing services of the character that these attorneys have would not have any lien and would not have any right by the court to charge a lien upon it.

The Court: No question of a lien, Mr. Brett. I do not recall the name of the case that involved this large building and loan association over here; the name does not come to me.

Mr. Brett: Guaranty Building and Loan?

The Court: No.

Mr. Clark: The one at Long Beach? [540]

The Court: No. This State-wide building and loan association, the Eggert case, the famous Eggert case where Judge Willis, over in the Superior Court, was upheld by the Supreme Court. Judge Willis held that the assets of the Fidelity Savings and Loan Association in the hands of—what is it, Pacific States?

Mr. Brett: Yes, sir.

The Court: —Pacific States Savings and Loan Association were held in trust by the Pacific States Savings and Loan Association. I do not remember the name of counsel, but I believe Mr. Henry Harris was one of counsel.

Mr. Brett: I think he was.

The Court: The counsel who brought that suit on behalf of the certificate holders of the old Fidelity Savings and Loan Association were awarded a large fee, and every certificate holder was ordered, or, rather, the receiver and the State Commissioner as receiver or conservator were ordered to pay out of its trust funds these attorneys' fees in some com-

plicated arrangement whereby each certificate holder would bear his fair share, and that was solely under the equitable power of the court and was sustained by the State Supreme Court. I do not have the citation of the case.

Mr. Brett: I am familiar with that case.

The Court: There was no question of a lien of attorneys. It was a question—again, of course, they did not call it [541] that, but that is what it amounts to—of the taxation of costs by a chancellor between solicitor and client, the sort of thing that Mr. Justice Frankfurter explained in some detail in his footnotes in the Ticonic Bank case.

We will take the afternoon recess at this time.

Mr. Preston: May I ask how long the court will sit this afternoon?

The Court: I would like to finish this.

Mr. Brett: I would, too, your Honor. I have to go to San Diego tomorrow.

The Court: I will refrain from asking you any more questions, Mr. Brett.

Mr. Preston: The idea, I am due at my doctor's at 4:00 and I was wondering whether I should have time to get there or I should cancel the appointment.

The Court: Can you keep him waiting a few minutes, Judge Preston?

Mr. Preston: What is that?

The Court: Can you keep the doctor waiting a few minutes?

Mr. Preston: I will try my best.

The Court: Recess of five minutes.

(Short recess.)

Mr. Brett: If the court please, I am going to close my remarks as promptly as I can to give Mr. Taheny an [542] opportunity to discuss the matter, and will leave it mainly to him in reference to this matter of the contract, because he has gone into that.

I would like to just close on this point we have been discussing, though. Of course, I do not believe I can be any more exact than I have in the briefs in the argument. I would want to point out to you, as I did in the brief, that in the Arenas case the United States Supreme Court very definitely gave a definition, at least, of the effect of this Act. That is on page 29 of my brief, in which it said:

“The jurisdictional Act of 1894 (which is the Title 25, Section 345 U.S.C.) under which this suit is in the courts, requires them to adjudicate legal rights of the parties and to render a judgment which will stand in lieu of the Secretary’s action if he has unlawfully denied a patent to an allotment to which the Indian is entitled. But courts are not to determine questions of Indian land policy
* * *. ”

Now, I think it is squarely in line with the argument I have made and with the language of the Section that it is restricted solely to having the court state what the Secretary could have stated, if he had carried out his duty, to-wit, that the conditions precedent have been performed under which

this particular Indian is entitled to a trust [543] patent. Beyond that I do not believe there is any enlargement of the right to sue the Government at all.

Now, we have discussed to some extent this question of this so-called res. I have adverted to various matters and I won't repeat them, but I would like also again to briefly refer to what I did, on page 25 of my last brief. It says two unusual forms of application. Insofar as the restrictions are concerned, if the court please, they are not personal. The restrictions run with the land.

Insofar as the rights are concerned, to the limited extent that the Indian gets a right under the trust patent, they are completely personal. As I pointed out, first, of course, we have the over-all provisions that are unlimited: That he cannot sell nor can he encumber whatever interest that he may have in the lands at all.

His use of them, which your Honor pointed out under Section 403, is a very limited use—it is limited to a use for farming or for grazing. He may not, for example, use them at all for business purposes unless the Secretary, which means the United States, consents. He has no right, as such, to use them for business purposes at all. Your Honor will remember we argued that at length in the Belardo case.

Another right that is an important right that runs normally with property is denied to him. He can't will this [544] property. He can't favor one person over another. He can't disinherit one heir.

He can't add to the amount that one heir would get as distinct from another heir. It is true that his right descends, but his right descends by virtue of who may be his heirs and in the order and in the amount of those heirs, and not through anything that he himself can do. There is no way at all in which he can control, change, or affect what his heirs receive in the event of his death.

As I have said, the restrictions run with the land, no matter who has it, whether he has it, his heirs, or wherever it is the restrictions exist.

And then this other most unusual circumstance that I know of no other situation existing in the law, and I have a reasonably broad knowledge of real estate law. I know of no other situation where the grantor, whether it is in the form of a gift or whether it is for compensation, may give an outright fee and may retain to himself, unlimited, at his discretion, the absolute right after that fee has been granted to re-impose upon it such conditions as he may elect to do. It is a most unusual situation.

Now, closing on that phase of it, if we accept the view that there is some manner in which this court may permit access to this property, it seems to me, if the court please, that just like the old trite saying that a rose by another [545] name is just as sweet, no matter whether we call it a charging lien or whatever right we may call it, the legal effect would be that you are imposing some form of charge upon this property. If you do not impose some charge upon this property and, as the petitioners have very properly brought to your attention in one of their

memoranda, if you do not accompany that with some right to effectuate the rights which accrue to that charge, that is, if you may not enforce it, then they have none. If you do give a right, regardless of what you call it, whether you call it imposing something as a form of a trust relationship or as an equitable provision or a charging lien, it is still a lien; it is the charge upon this particular property while the property is in the hands and the title is vested in the United States.

I submit, if the court please, that the only way that that could possibly be done—the only two ways that that could possibly be done would be these: One, that there would be some power in this court, by a decree, to execute a judgment. That we know we can't do, because I have pointed out in my brief there is a specific section in this Indian Code that prohibits any form of execution of a judgment against him.

The only other manner that I could possibly see that your Honor could do it would be through some form of process [546] by which you could compel the United States, through some appropriate officer, to affirmatively do something. If you do not do that, it would be nugatory. If you can't levy execution on it and the title is in the name of the United States, how could the title be gotten out of the United States or any right be gotten out of the United States, excepting if there would be some manner in which this court could compel some one with authority to divest the United States of that title?

I do not think it can be gainsaid that a mere

recording, for example, of a decree in the form of a judgment could effect a lien upon property in the name of the United States. There is no such thing. You can't have a lien against the United States.

The only way in the world that you can affect property that stands in the possession and is recorded in the name of the United States is to have some manner whereby the court has a power to require some officer or agent of the United States to transfer that title. If you can't do that, you can't do anything about it. I mean whether you want to or not. I mean it just can't be done.

The only other manner, of course, would be, as I say, through execution, which is an indirect manner of doing that. In other words, there are various forms, of course, of execution. There is the normal form where the sheriff or [547] the marshal or whoever it might be seizes it through a process and submits it to sale and disposes of it, and then executes his deed, or he might appoint a commissioner or a receiver or some other agent of the court. But the ultimate result would be that there would be someone lawfully authorized to dispose of property belonging to the United States; and that, I submit under all the decisions here, cannot be done.

Even the Equitable Trust Company case did not assert that right. The Equitable Trust Company case were funds; they were physical assets; they were in the hands of the court, not in the hands of the United States, and in which the United States had expressly requested be disbursed in certain ways and asked the jurisdiction of the court on that basis.

Of course, you had the United States before it, or, rather, I mean it had the United States before it. It could say: You have now sought this jurisdiction. You have submitted to this court, therefore, you can be assisted. And I think that the court there had the power, which the court here does not, that I pointed out before.

There it had the power, properly and rightly, to say to some official of the United States Government: Now, here, out of these funds which you are holding as an officer of this court, turn over so much to so and so. And I think it would have the further authority, if they did not do it, to [548] use all of the authority that this court has to enforce that right.

Here you have no such authority. If you make such an order, against whom and by whom could it be enforced?

I should like to have counsel answer it. I have searched and I can't conceive of any possible way that you could.

Now, there is just one other or two other points that I want to briefly refer to. I would like permission, if the court will permit, to save time. I feel that it is appropriate that there should be some comment with reference to this appraisal of some million dollars; and I do not feel it would be appropriate to take the court's time. I can do so, I think, on approximately six sheets of paper.

What I want to point out, briefly, is this: I want to point out expressly the manner in which that was arrived at, which I think that your Honor can de-

termine as a matter of weight. I want to show you, exercising the judgment that I know you are, that it was an improper form or technique of approach to the appraisal.

The Court: What do you think the property is worth?

Mr. Brett: Sir?

The Court: What is your contention as to the value of the property, approximately? I am not attempting to commit you to it.

Mr. Brett: Your Honor, I do not believe——

The Court: They say it is worth a million dollars? What do you say?

Mr. Brett: I would say, your Honor, I do not believe that it is worth in excess of a third of a million dollars.

The Court: All right. The difference between it would not matter, in my conclusion.

Mr. Brett: Of course now, that is on a fee basis I am taking that. I do not believe the trust patent, as such, has anything but a very nominal value.

The Court: We are speaking of the fee simple title?

Mr. Brett: Yes; of the fee simple title.

The Court: Do you think it is around a third of a million?

Mr. Brett: I would say I do not think it is worth more than that. I do not think it is worth that, but I would say at the top, I do not think it is worth more than that. That is my view of it.

The Court: I will be glad to have anything you wish to submit. I will say, so far as the court is

concerned, it would not matter whether it was 300,000 or a million.

Mr. Brett: Were you asking me a question, your Honor?

The Court: I say, it would not matter to me as far as I am concerned whether the value was 300,000 or a million.

Mr. Brett: I see. The reason, I feel, your Honor, with due deference, I would have to say this: I think, either [550] on a quantum meruit basis, if you decide that is the remedy, or on a contract basis, you have to fix it in money. I do not believe that there is any legal method that you could fix it in kind. In other words, these attorneys contracted originally for money.

The Court: They contracted on a percentage basis, did they not, originally?

Mr. Brett: Originally for the value of land in money, the market value of the land, not percentage of the land itself.

It is true they did make a provision which they have not made any attempt at all to follow; they did make a provision that if there was a disagreement—and so far there has been no disagreement, as I pointed out in my brief—and this is the most astounding thing I have ever seen, and I say it in all sincerity, it is the first time in my experience that I have ever seen anyone making a claim without doing two things: One, finishing the job. They did not finish the job. They have neither sought a patent nor have they endeavored to reach any agreement with the client as to compensation, nor have

they sought in behalf of their client to have restrictions removed. They have done nothing. They have simply come in after they have gotten a partial proof of what they agreed to do.

But secondly, I have never known a case until this one—I [551] understand Mr. Taheny has heard of some, but I have not—I never heard of a case yet where the attorneys ever sued for their fees unless they first, at least, rendered a bill to a client to try to get a client to make some arrangement agreeably. They have made no effort to try to fix some arrangement, and then arrange with the Department of Interior and say: “Now, can we work it out?”

The Court: Arenas discharged them, did he not?

Mr. Brett: Sir?

The Court: Didn't Arenas discharge them?

Mr. Brett: No, sir. They have never been discharged by Arenas. They do not allege so. It would be news to me. As far as I know, they are still in charge of it, excepting, of course, in this particular instance he had to have some particular defense of this particular matter. I do not say that it is improper. I just say it is novel to me.

The Court: I just assumed from the facts that Lee Arenas was represented now by other counsel; that they have taken over.

Mr. Brett: To the best of my knowledge, your Honor, the first knowledge that Lee Arenas had that they were making a claim for a fee or anything at all was when he was served with an order to show cause.

Mr. Preston: No; that is not true, and you know, yourself, we tried to negotiate with your department to put [552] a proposition up to the Government. You know that.

Mr. Brett: That is true, after the suit was brought.

Mr. Preston: Counsel and we have been in numerous conferences, if the court please.

The Court: Let us go ahead with the argument, gentlemen.

Mr. Brett: I mean I think I am entitled to answer just that one thing. It is true that something was proposed after we were in the midst of the litigation, and the answer I got: If it is submitted to the court, we do not want to take any action.

My point was, nothing had been done in advance before that. Maybe I have been misinformed. If I have been misinformed, had any word gone to Mr. Arenas about this matter until he was served with the order to show cause?

The Court: What matter?

Mr. Brett: With reference to the fees or anything?

The Court: I could not say on that.

Mr. Preston: I could say.

The Court: Are you suggesting that the Secretary of Interior is disposed to settle this matter or be a party to the settlement of it?

Mr. Brett: No, sir; I am not. I do say this:—

The Court: It would not do these attorneys any good to talk to Lee Arenas. It would be like talking to a young boy [553] about a hundred dollars

when he does not have anything but marbles in his pocket, wouldn't it?

Mr. Brett: Well, I don't know that that would be true. I don't know that if they would suggest some arrangement with Lee Arenas and would apply to the Secretary of the Interior, that he would not approve that arrangement. I have no way of knowing, your Honor.

The Court: In the analogy I was making no reflection upon Mr. Arenas, but just like in the case of a boy, his father would have all the money there was in the family, and in this case Uncle Sam has all the money that Mr. Arenas needs, doesn't he?

Mr. Brett: That is true; that is true.

The Court: Why talk to Mr. Arenas if the Secretary of Interior has the attitude that no matter what it is, he is not paying anything?

Mr. Brett: Your Honor, I personally think that is an erroneous view.

The Court: Well, I hope it is and I just misunderstood it.

Mr. Brett: Certainly there is nothing there in the pleadings, nothing in my instructions, nothing in my information that I have received to even intimate that.

The Court: I understood you to say when you first came in here, and probably it was a misunderstanding, but it shows [554] how those things can arise. Perhaps I misunderstood you, but I understood you to say that the Government did not care how much these petitioners get out of Lee Arenas, but as far as the Government was concerned, it was

not paying one penny out of Lee Arenas' account. That is my understanding of the attitude, and I assumed you were expressing the attitude of the Secretary of Interior.

Mr. Brett: I was, but I do not remember saying it in that language, or, if I did, it was certainly inapt.

The Court: There was not any mention of the office, but that was my impression. You said, that as far as the rights against Arenas were concerned, the Government was not interested.

Mr. Brett: That is correct; yes, sir.

The Court: I just misunderstood you. If the Secretary of Interior is disposed to settle this matter, I think you gentlemen should all try to settle it.

Mr. Clark: Your Honor, we have done it. We have put it in written form and the Secretary has turned it down cold. And if you will look at the Government's letter of instructions to Mr. Brett—

The Court: I do not want to hear anything about it.

Mr. Clark: This is in evidence here. Didn't you put in evidence here your letter of instructions, asking relief from your former commitment to this court and counsel? [555]

Mr. Brett: No; I did not.

Mr. Clark: Oh, you did not?

Mr. Brett: No, sir.

Mr. Clark: I beg your pardon.

The Court: I do not want to hear any details of it. But if there is any possibility, of course, it is a matter that should be settled. I will decide it.

Mr. Brett: I understand that. What I wanted to

say, would your Honor give me permission to do this: I would like to point out about six cases in this Gallagher Report where there are broad discrepancies in reference to the same subject. As an illustration, I can show where in one instance he evaluated one piece of property for one purpose or a certain face value, and evaluated that same piece of property at another page at a different value. So you cannot take the general character of the omnibus phase of this report, in which he throws practically everything into the kitchen sink and then comes out with an answer.

The Court: Mr. Brett, of course, if I am bound to determine the value of the property and make an award in dollars, that is one thing; if I am not bound so to do, I do not intend to do it. If any award is made, as I indicated before, I intend to make it in terms of fractions of percentages.

Mr. Brett: Then, may I put it this way, your Honor? [556]

The Court: Do you feel I am bound?

Mr. Brett: I think you are.

The Court: Bound to translate it, here and now, into dollars, instead of at some later time?

Mr. Brett: I think you are.

The Court: Instead of stating a formula, am I bound to put the dollar sign and put some digits after it?

Mr. Brett: I think you are, your Honor. Yes, sir; I think you have to put it in money. But if you decide that you are not—I am perfectly willing to do this, however: I am not trying to impose conditions on the court. I mean what I feel is this: If

your Honor is undecided on that point, I would ask leave, if you do determine it becomes your duty to fix it in money, would you then give me leave, instead of taking the time now, to briefly comment so you will understand our reason for believing that you should give an actual figure? And I will limit myself exclusively to pointing out matters of debate recited there, to show incompetent matters considered and discrepancies in reference to the same subject matter to a very broad extent, amounting to thousands of dollars on the same property.

I would like to point that out, because your Honor does not have time to search out all those things and I think it would assist you.

The Court: If I had to determine the value, I would [557] want a full discussion of all of the reports.

Mr. Brett: Then, if we may have that, I do not want the other.

Then the only other thing I want to say, because I understand Mr. Taheny is going to discuss this contract, I would just like to make two brief statements in reference to the contract and why I believe that the 10 per cent contract is the one which must prevail.

The evidence shows very clearly, if the court please, that the attorneys took extreme care in drawing that first contract. They were dealing with subject matter which they believed important, as is shown, and they covered all phases of it. They not only covered these percentages, they covered the property involved, they covered the rights involved.

They made it specific that they were obligated to go through to the final court of last resort. And then, in addition to that, they discussed the possibilities of the disagreement and possibilities of remedies as between themselves—a very carefully drafted document, one which, by the testimony of Mr. Clark and Mr. Sallee, was revised on several occasions.

There is evidence here to the effect that it is their view that it was superseded by this subsequent document. The first thing that I would ask your Honor to consider, and I think you will consider, is why use a mimeographed [558] form? It just does not seem consonant with the other work that these attorneys did, including the careful preparation that they made in respect of this first contract, that they would use a mimeographed form if, in fact, the intent and purpose was to make a written recital of a previous oral arrangement.

I would ask you to consider that. It just does not seem to me consonant with the other careful detailed actions of these attorneys.

The next thing, the letter which was introduced, which was together with one of the letters which was introduced here before, both disclosed that Mr. Sallee, considerably subsequent to the time when Judge Preston was actually employed, considerably subsequent to the time when they say they had the original oral arrangements by which they informed this Indian that they felt that it was necessary to employ another eminent counsel, wrote letters in which, to all ordinary appearances, was a first introduction to them how to act. Those letters, particu-

larly, it seems to me, they could not possibly have acted in that light if previously there had been detailed conversation—not one—Mr. Clark recites there were three at least in which they had discussed relative merits of getting Judge Preston, and saying: “I will carry on if you want to, but we think we should have Judge Preston,” and yet then later write this letter and say: I have just examined and approved such and such a document or petition for certiorari, and we have engaged the services of Judge Preston. And it says who Judge Preston is. Why would they have told them who Judge Preston is if they had already told them orally? That is the second thing.

The next thing I would ask you to consider is this: Mr. Sallee supposedly stated that when Judge Preston was approached and arranged to be employed, that he made a partial assignment of the first contract to Judge Preston. Judge Preston had knowledge of it and was given a copy of it and he made a partial assignment of it.

I think, very clearly, that having accepted that assignment, necessarily Judge Preston accepted all obligations under that contract, and the obligations under that contract were to carry it through the court of last resort by Mr. Sallee and just whom he chose to associate.

Now, it would seem to me that, irrespective of whether it be absolutely true that the fulsome story was as here stated, that they had oral conversations in which they told Mr. Sallee: Well, now, here, it would be beneficial to get Judge Preston, etc., the

fact, nevertheless, was that it was their bounden duty to tell Mr. Arenas: But nevertheless, we have given Judge Preston a part of this contract and he has become obligated to you to carry on. Under what other circumstance could he accept a part of that contract? [560] What would be the basis of it?

Now, there isn't possible any slightest indication that this man had independent legal advice; and I am satisfied that no attorney—I say “no attorney” and I emphasize it—could possibly have advised that Indian other than the fact: Why, Mr. Arenas, there is no consideration running to you. You do not need to give Mr. Preston one cent under this contract. These attorneys are obligated to you now to go through the court of last resort, every one of them. There is no reason why you should increase what you should pay, after they have made that binding bargain with you.

I want to leave those thoughts with you when you arrive at this determination, as to whether or not this mimeographed form which, in answer to your Honor's question, Mr. Clark said specifically in the last testimony on March the 8th—I take it your Honor asked the question—you said to Mr. Clark: Well, did you have agreements similar to the 1940 agreement with all the other Indians? Mr. Clark said, “yes.” And the court asked: Did you get this mimeographed contract with the other Indians signed at the same time? Mr. Clark said: Yes; that there was some difference in date, according to when we could get them signed up.

Under those circumstances, if the court please,

considering the fact that these men were experienced, that they [561] were men who exercised care in all of the other acts that they did, I cannot conceive of their utilizing this mimeographed form which is cast in the regular form that you could get in any form book, Jones, Jones or any of them have a form power of attorney. I can't conceive of their using that mimeographed form, which does not refer to the property, does not refer to the previous contract, does not refer to any of the previous arrangements, does not say in any form or manner that it is an exemplification of nor is it intended to recite the provisions of a subsequent arrangement made, does not say that anything respecting it supersedes anything, how they could rely upon that. And I ask that your court give that very serious consideration, together with the fact that they had accepted, each and every one of them, assignments of the original contract and were duty-bound thereunder to perform under its obligations.

Mr. Taheny: Your Honor, the particular point that I would like to address the court on is the question of fact in this case as to whether or not there was an abrogation of that 1940 contract either by a subsequent written contract entered into for that purpose or by an executed oral agreement, as suggested yesterday in the brief filed yesterday.

When I went over this case and was first employed, I came in with no idea except I feel that Mr. Arenas was [562] entitled to representation. I had no idea of the facts. I knew who was opposed to Mr. Arenas. I saw their allegations in their peti-

tion and I had conversation, of course, with him and his wife.

I took it that the testimony put in here by Mr. Clark and Mr. Sallee would be probably what it was. I was somewhat surprised when I found out the case went on quite sometime before they put in the testimony of these conversations relative to the alleged abrogation of that 1940 contract. I was very much surprised when, on February 20th, they submitted the case and it was not until after they had submitted the case on the evidence that Mr. Clark, at a subsequent hearing, came in and gave this testimony.

Now, it is my duty as a lawyer to set forth the evidence as I see it; and I will say this to your Honor and to these attorneys, sincerely, that if I thought for one moment that I was on the wrong side of the case as far as the truth is concerned, I would not utter what I am going to say.

Now, I do not think these attorneys, and there is no evidence to satisfy me or convince me that they are deliberately saying anything that is not true. But knowing attorneys, knowing how they operate, the average attorney, when he has a case that goes on for several years, can very seldom report what the facts are when questioned until he refers to his file. He will very often find the notes [563] and memorandum in his file to be contrary to what his impression was of the facts.

In this case there has been no memorandum whatever introduced to show that any of these attorneys refreshed their memory by anything, and I want to

say this, your Honor: That Mr. Sallee in this case carried on a very, very extensive conversation with Mr. and Mrs. Arenas. These letters are not in evidence, but I have just a few of them here—a very extensive correspondence, writing them continually, and never once in one of those letters did he at any time refer to the fact that there was an abrogation of that 1940 contract or that there was to be an added compensation by reason of the association of Mr. Preston.

The more I have seen of this case, your Honor, I can't help but feel that the truth is shining out here in such a convincing way that there can be no question but that Mr. Arenas—just an humble Indian—is on the side of truth and that the witnesses for the petitioners are in grievous error, in great error.

Now, can you imagine, your Honor, can you imagine that the facts would be that in 1943 the attorneys would tell Mr. Arenas and his wife that they intended to associate Mr. Preston; that in doing so it would be necessary to pay a higher fee; and if he would pay the higher fee, they would continue? And the testimony here is supposed to be that; that they told him the name of this man, who he was, that he had been on the Supreme Court, and that they should have him and he would lend a lot of prestige to the case.

Can you imagine that happening, and Mr. Sallee continuing as the man who is in everything and doing all the letter writing, and then on September 24th Mr. Sallee writes as follows:

“I just O. K.’d the final draft of the Petition for Certiorari in Lee’s case this morning. It is now in the printer’s hands and will be filed this coming week. We have associated with us on this, one of the leading lawyers in the West, a man who used to be on the Supreme Court of the State of California, and he is”——

This says “an”; I suppose he means “as”. “as enthusiastic as we are that the ultimate outcome should be in our favor. I don’t know what the printing bill will be, as we have to print a good many of these”——

The rest is not important.

The Court: What is the date of that, again?

Mr. Taheny: September 24, 1943. That letter right there, your Honor, is a memorandum showing that Mr. Sallee and Mr. Clark are mistaken when they say that they told Mr. and Mrs. Arenas before that date that they were going to [565] associate Mr. Preston if they agreed to pay an additional fee. There can’t be any question about that.

Now, we all know that truth must be consistent with itself, but the inconsistencies of this case are very glaring and very damaging; and if it were not for the fact that there is just a humble Indian on one side and dignified and well-known, prominent attorneys on the other side, there would be no necessity for even arguing it. In my opinion, why, it stands out. But now, can you imagine this: Mr. Preston asked at the last examination if there was an executed oral agreement. He put that in there because he would get around the rule that requires

a consideration, where one contract modifies another.

Now, that, your Honor, if I do say it—and I say it respectfully, too—the whole thing is ridiculous. Now, for example, here we have Mr. Sallee and his testimony which is in this record, showing that he assigned part of his rights to Mr. Clark and part of his rights to Mr. Preston, part of his rights under the 1940 contract. That is what he testified to. It is in the interrogatories on file here.

All right. Would he be assigning his rights under the 1940 contract if there were any truth at all in the assertion that there was an executed oral agreement to rescind and completely destroy the 1940 contract?

Of course not. There, again, you see the inconsistency [566] standing out. These men knew the 1940 contract was never abrogated and that is why the assignment was made, and that is why that testimony was given here.

Now, if there was an executed oral agreement—I am going to go a little fast, your Honor, because I know it is going to be late—if there was an executed oral agreement, wouldn't that have been pleaded? And there is no pleading here in their petition. Their petition is founded upon the 1945 contract, the alleged contract—I call it an agreement and something that was signed, but it is not a contract as far as this case is concerned.

That ties in with what Mr. Brett said. Why would these gentlemen delay until after the proceeding in the Supreme Court had been terminated

and until the matter had come up for trial the second time and until that trial was finished, and then after all that is done, then go and have a written agreement with Mr. Arenas for added compensation in this particular case?

Well, we know they had the agreement signed. But the very fact it was on a mimeographed form and that they were rounding up a lot of other Indians at the same time, and the fact that Mrs. Arenas, who is not a party to this case, signed a facsimile of the very same contract, shows that those contracts were obtained at that time for some other purpose and not for this particular case. [567]

There is only one suit in which Mrs. Arenas was involved, and that was the ejectment suit. Mr. Preston said yesterday a series of ejectment suits they brought, covering the very same issues. That may be and it may not be. Whether it does or not is material, because the hearing here today is not for fees in an ejectment suit.

The Court: Mr. Taheny, this proceeding is not an action upon the contract, either, is it? Does the contract have any office here other than to fix the maximum beyond which the court could not make an award?

Mr. Taheny: You mean the 1940 contract?

The Court: Any contract.

Mr. Taheny: I think, your Honor, in their petition——

The Court: Suppose in an equity case an attorney recovered a large sum of money; the court thought he was entitled out of the fund to a third

of it; the client might bring in a contract and say he agreed to do it for 15 per cent; would not that be the only office of the contract, to fix a maximum beyond which an award would not be made out of the fund?

Mr. Taheny: Well, that may very well be, your Honor, but it is also a maxim of equity that a party cannot recover on a theory that is contrary to something which he pleads when he brings himself into court. They can't come in here and plead that they were relying on a written contract of [568] 1945, and then plead that there was an unexecuted oral agreement on which they were relying, or, rather, an executed oral agreement is what I should say.

The Court: What, in your view, is the effect of your provision of the 1945 agreement providing for a quantum meruit arrangement and the reason that would serve? What effect did that have, in your view, upon the 1940 agreement providing for a 10 per cent fee?

Mr. Taheny: Well, you mean if I assume that that contract was signed for the purpose of qualifying the 1940 contract or of superseding it?

The Court: It does not make any difference what purpose it was signed for, does it? The contract of 1940 is broad enough to cover any conceivable services rendered on behalf of Lee Arenas in connection with his allotment, isn't it?

Mr. Taheny: That is right.

The Court: It would cover the defense of an ejectment action, would it not?

Mr. Taheny: It seems to me it probably would.

The Court: I do not know. The attorneys are not bound to carry it through to any given end, irrespective of their judgment in the matter, but the 1940 agreement seems broad enough to cover any conceivable services that the attorneys might render in connection with Arenas' claim for an [569] allotment.

Mr. Taheny: That is right.

The Court: Now, to defend his possessory rights there would be part of it, would it not?

Mr. Taheny: Well, it very likely would, your Honor.

The Court: And if it is, or, to put it this way: If the 1940 agreement covered the situation, what was the occasion for the change in the arrangement to a quantum meruit, assuming, as you say, that the ejectment suits occasioned it, assuming that this mimeographed form was really a convenient form to file in each action to show the authority of the lawyer to represent, which theretofore had existed under the 1940 agreement. What can we do with that last paragraph which says that the compensation shall be on a quantum meruit basis, not a 10 per cent basis?

Mr. Preston: If services were performed after that date.

Mr. Taheny: Your Honor, I feel that that 1945 contract in a case of this kind—I am going to withdraw that remark. I would say that as far as this is concerned, No. 1321-O'C, that 1945 agreement must have a consideration. In order to have any effect, it should. In other words, it must be a contract.

The Court: Well, the consideration would be the continuing service, would it not? [570]

Mr. Taheny: No; that is not. That is the point. I have cited in my brief case after case there that holds that where there is already a contract obliging that party to do what the second agreement calls for, there is in such case no consideration for the second agreement.

The Court: But those are cases, Mr. Taheny, where the other party is absolutely bound to do a certain service. These attorneys were not bound, were they, to go to the Supreme Court?

Mr. Taheny: Yes, your Honor; I say they were.

The Court: Whether their judgment took them there or not, were they bound? Suppose they had gone to the Circuit Court and they had lost and Lee Arenas said, "Well, I want to go on. I want to go to the world court, if I can. I want you to go on and you are bound under this." And they said, "Why, no. There isn't a chance. We haven't any basis for relief from the Supreme Court. There isn't any chance." Was Lee Arenas entitled to have them go, anyhow?

Mr. Brett: Yes.

The Court: Point that out to me in the contract.

Mr. Taheny: Your Honor, on page 4, line No. 17, that the attorney "shall pursue the litigation in question to and through the Court of final resort, unless authorized by the Secretary of the Interior to terminate the proceedings at an intermediate stage thereof;". [571]

The Court: Well, the Secretary of the Interior washed his hands of it.

Mr. Taheny: That is not material.

The Court: So there was every reason to dispose of this contract, wasn't there, after the Secretary of the Interior wrote his letter of June 3, 1943?

Mr. Taheny: No. The contract says they must pursue this case to the court of final resort unless the Secretary of the Interior authorizes them to terminate the proceedings before going to the court of final resort.

The Court: That would not be an absolute commitment, would it?

Mr. Taheny: I beg pardon?

The Court: The Secretary of the Interior refused to have anything to do with it.

Mr. Taheny: All right; therefore they had to carry this case to the court of final resort.

The Court: Did not the consideration fail upon that?

Mr. Taheny: No; I don't think so. These men made a contract to carry the matter to the court of final resort. I do not see how they can get out of that obligation. That is the 1940 obligation.

The Court: Is it an absolute obligation, or is it an obligation to do so unless someone passes on it and it is met with the idea in view of mutual mistake of fact, that [572] the Secretary of the Interior would act in the matter?

Mr. Taheny: No; I do not think so, your Honor.

The Court: What effect would that have on this contract? It is replete with provisions looking to the

Secretary of Interior to take some action or give some approval, and he refuses to have any part of it. What effect would that have upon it?

Mr. Taheny: Then that means their performance, their obligation continues, because, if the Secretary does nothing, then he has not terminated their continuance.

The Court: That is not what was contemplated by the contract, is it? The contract contemplates intelligent action, consideration. The Secretary of the Interior says: I just won't look at it. I won't have any part of it. He said, in effect, it is none of my business, didn't he?

Mr. Taheny: All right. I would say in that case, if these attorneys went to Mr. Arenas and said, "Mr. Arenas, we have lost out in the District Court; we have lost out in the Circuit Court. It is our opinion we should not go any further." If Mr. Arenas agreed, all right; they could end it there. If Mr. Arenas said, "No; I want you to continue. I insist you fulfill your contract," they are obliged to go on and fulfill that contract.

That is the point, a very important point. They were obliged to do by that 1940 contract everything which they [573] did do in this case, therefore, there was no consideration for the 1945 agreement insofar as it relates to this action. And I am satisfied that it was never signed with any intention of applying to this particular action, for many, many reasons.

The Court: Wasn't it signed for the purpose of applying to the services thereafter rendered?

Mr. Taheny: Your Honor, the testimony of Mr. and Mrs. Arenas, or Mrs. Arenas particularly, is that it was signed in connection with the ejectment suits. The ejectment suits were pending against about 14 of these Indians.

The Court: I recall all that.

Mr. Taheny: Yes. There is a conflict on that point. Your Honor will have to resolve that conflict.

But bear in mind these other things I have pointed out and bear in mind the care which was used in the drawing up the 1940 contract, all the correspondence that passed, and never a word said, except this letter which I have put in evidence; and that letter itself indicates that nothing had been said, as these witnesses testified, to Mr. or Mrs. Arenas about the associating of Mr. Preston. That letter, by its very language, indicates that that was the first knowledge that Mr. Arenas was getting that a man had been associated. They did not even mention his name. They would not write and say: We are associating a man who has been [574] in the Supreme Court and he is a very able man, which was Judge Preston. They would not be doing that.

It shows that Mr. and Mrs. Arenas are correct in their testimony, and whenever a discussion took place about Judge Preston, it took place after he entered the case, and that he entered the case not on the strength of the oral agreement to pay an increased fee but he entered the case on the strength of the 1940 contract with respect to which he had received an assignment along with Mr. Clark.

The Court: What is your view as to the quantum meruit? What value is to be placed upon the services?

Mr. Taheny: I would not have said a word, would not have brought up the subject, your Honor, at all except for the reason I am satisfied in my own mind that the 10 per cent contract controls here. It controls all the facts and it controls all the law.

The Court: That is not my question. My question is: What is your opinion, as a lawyer, as to the quantum meruit value, the reasonable value of the services these attorneys have rendered Arenas?

Mr. Taheny: If we want to discuss that particular feature, we have to divide the case up, I think, between the services of Mr. Clark and Mr. Sallee, on the one hand, and Mr. Preston, on the other hand, because they say under their theory that this 1945 contract was signed solely because of [575] the association of Mr. Preston, who came into the case after it had been going about three years.

The Court: Well, the arrangement was said to have been made way back in 1943, was it not?

Mr. Taheny: That is what I say, the case had been going until 1943 before he came into the case.

The Court: And it is said that this 1945 contract was occasioned by these ejectment suits—merely stipulates the measure of compensation which had heretofore been orally agreed upon.

Mr. Taheny: That is their theory, your Honor, yes. That being the case——

The Court: What would you say now the judgment is final—in your opinion, under all the cir-

cumstances, for all three lawyers 10 per cent of the value of the land is a reasonable fee?

Mr. Taheny: Your Honor, I was proposing to divide the answer up.

The Court: I was trying to save you a little time.

Mr. Taheny: Yes.

The Court: I thought you could just tell me if you want to.

Mr. Taheny: I feel this way: That Mr. Clark and Mr. Sallee having agreed for 10 per cent and having agreed to carry the case all the way through for 10 per cent, that they [576] should keep their bargain, and no reason for added compensation to be paid by reason of Judge Preston. I would say that, since he came into the case after the case had been tried and after the matter was to go up on appeal.

The Court: Judge Preston entered the case after the action had been dismissed, not after it had been tried.

Mr. Taheny: Well, I mean that, yes; after it had been dismissed and after it had gone to the Circuit Court of Appeals that ended the case. The grounds of appeal had been set forth in connection with the preparation of the transcript for that appeal, and the same two grounds were used in the petition for certiorari as were used in the Circuit Court of Appeals case, and the same points were made in support of those grounds, the same four points, in the same order and supported in about the same way.

I can't agree with Mr. Cosgrove that there was

any great difference between the petition for certiorari and the brief in the Circuit Court of Appeals. I have gone over them; I have looked over the record and at the trial brief.

The Court: The difference was in the result, was it not?

Mr. Taheny: Yes, your Honor; the difference was in the result, but that could not be charged to the brief, I think that difference was in the difference in the court and in the attitude of the court. [577]

The Court: Mr. Arenas did not do it himself. These same lawyers did it.

Mr. Taheny: That is right.

The Court: This is one of those situations where there was a very great contingency, wasn't there? It becomes greater all the time. There was a great contingency upon victory. Now there is a great contingency upon recovery, and I am speaking now of contingency of victory alone. **Results counted, didn't they**, because, without results there was no means to pay for their services; isn't that correct?

Mr. Taheny: That is right.

The Court: These results would weigh heavily, would they not?

Mr. Taheny: I think so.

The Court: So we have a successful result. Now, it does not accomplish anything to say: How many hours did Mr. Sallee work; how many hours did Mr. Clark work; and how many hours did Judge Preston work, does it?

Mr. Taheny: That is right; that is right.

The Court: What is the result worth?

Mr. Taheny: That is right.

The Court: The labor was done and I have no doubt it was considerable, probably more considerable than if they had been working in an open field. I think that all lawyers would assume that if you are working in a very close field, [578] where you are hemmed in by unfavorable precedent on all sides, you haven't much room to operate in, have you? And it may be you could say: Well, Judge Preston was just lucky he happened to say the thing that caught the eye, or it may be that you could say that all anyone needed to do was to get this case before the Supreme Court and the rest of it followed. We do not know how much, but we do have to determine what is the reasonable compensation for these lawyers for the results they achieved for Lee Arenas.

Mr. Taheny: Well, I do not think that that is the question, your Honor. I think the 1940 contract provides and covers that, and therefore I haven't given any thought——

The Court: Now, Mr. Taheny, I ask you to lay aside the contract and tell me your opinion on a quantum meruit basis, as an officer of this court. If you do not care to do so, that is all right.

Mr. Taheny: I do not care to do so as regards the three attorneys, because I have given no thought to that. I have given some thought as to what is the value of Mr. Preston's association.

The Court: All right; tell me that.

Mr. Taheny: Well, I feel that the association of Mr. Preston along with that of Mr. Clark and Mr.

Sallee did not add 150 per cent to the value of the services. In my opinion, probably it did not add more than a quarter, 25 [579] per cent, to the value of the services. That is the way I look at it, because——

The Court: Now, translate that for me, will you, please?

Mr. Taheny: Well, I take it this way: These men made a contract which they, at the time they made it, assumed was fair, testified it was fair, a ten per cent contract. After it is all done and they have the result, they want more. But sometimes an attorney guesses wrong when he makes his percentage, but they were basing it upon the fact this land was very valuable. They had that idea in mind. Perhaps they did not know the value, but they were gambling on that and they fixed their 10 per cent.

Bear in mind they have another case they intended to file in the same category as this one, with no more fees to it.

The Court: Mr. Taheny, if they are bound by the 10 per cent, it does not make any difference whether it is a good deal or a bad deal, does it?

Mr. Taheny: That is right.

The Court: I am asking your opinion on the quantum meruit basis.

Mr. Taheny: I might not have taken the case for 10 per cent, myself, but we attorneys sometimes will take a case on a low percentage if the value is high. They took this case knowing they would probably have to go to the court of final resort in view of the decision of the St. Marie case. [580] That

saved a trial at the start and managed to get their case going for a decision on the pleadings, which saved them quite a bit of trouble and expense.

As far as the evidence was concerned, that evidence was all laid out in that St. Marie case. All they had to do was to convince the court that the decision in the St. Marie case was wrong, the Supreme Court not having passed on that case because the petition was one day late, so even the petition had been filed in the St. Marie case. They had something to go on and to follow. The trial of this case, your Honor, only took two days and only three witnesses testified.

The Court: I understand.

Mr. Taheny: There was no contest at the trial.

The Court: I understand that there was a great deal of work done, I suppose.

Mr. Taheny: The work, I would say, was done by Mr. Clark, who in turn had the benefit of the work done by Mr. Sloan and others in the St. Marie case.

I am not taking any credit away from Mr. Clark. He built this case and put it through. He associated Mr. Preston after it had gone to the Circuit Court of Appeals, at which time it was very well crystalized. And then a brief was filed, just a take-off on the brief Mr. Clark had prepared. But unless Mr. Preston's name, alone, is to be given great value I can't see where he added anything substantially to the [581] case.

The Court: Did you ever try a case on a new trial after it had been reversed on appeal?

Mr. Taheny: Yes; I have tried cases as much as four times.

The Court: Where you had tried it, yourself, where some other lawyer tried it before?

Mr. Taheny: I have done both, yes. I don't like it.

The Court: It is arduous labor, isn't it?

Mr. Taheny: Yes; that is right. You will have a file at times maybe two feet thick. However, this case when Mr. Preston came in had not been tried, your Honor. It had gone through on a motion to dismiss and there was no trial, and therefore no great big transcript to start. He just had a little record, a rather small record, and the brief was a take-off on that brief in the Circuit Court of Appeals.

So I really say if you analyze this case, your Honor, and look into the facts, look at that transcript in the Circuit Court of Appeals, and compare those briefs, you will see that so far as the case in the Supreme Court of the United States is concerned it was just about the same case as you had in the Circuit Court of Appeals. There was a different court, looking on it differently; that is about all you can say.

Mr. Preston, at one point, said: "Well, how about our closing brief?" The Supreme Court closing brief was merely [582] a repetition of the opening brief. There was nothing I could see newly added in the Supreme Court brief. That is how I feel about it.

The Court: You have not told me yet what you

would add to the 10 per cent on account of Mr. Preston's services.

Mr. Taheny: I know that these men feel 10 per cent is enough for Mr. Sallee and Mr. Clark who started the case. I do not think that more than 12½ per cent should be given because of the association of the man who comes in at the late stage in the case, when it is ready to go to the Supreme Court, and files a brief just like the brief already filed. I can't see where those services are worth more than one-quarter of the services of the other two men. I can't see that. I can't see it.

I am assuming now, of course, it is worth 10 per cent. I have not answered your Honor's question what I would charge if I were in the case, because I have given no thought to that.

The Court: I did not ask you that question.

Mr. Taheny: It amounts to the same thing, in other words.

The Court: No. I asked you your opinion. You are a lawyer. You are arguing against a larger fee; so you must have some opinion, and I wanted the benefit of it if you cared to express it. [583]

Mr. Taheny: I have given no thought to that, for this reason: I know your Honor is going to be fair if you do decide to grant it on a quantum meruit, but I felt so convinced that the 1940 contract was controlling here, and I also felt it was not proper for me, as a lawyer in a case, not as a witness, to give an opinion on a matter of that kind, because you know opinions can be very, very different. We have opinions of the value of land:

\$211,000, \$100,000 and 1,000,000, on the other hand; and that is the way attorneys' opinions are, too.

I probably would not have taken the case on a 10 per cent contract, myself. That is all I can say, at the start, because it is against my policy to work for those percentages in any kind of a case. But Mr. Clark, in his wisdom, decided on 10 per cent after a careful study of the case beforehand.

Now, I want to say a few more words, if I may, on the 1940 contract. I did not mention all the points on it.

The Court: Are they different from those in your brief?

Mr. Taheny: There are one or two points that are not in the brief. I do not know how your Honor feels about this so-called point that was raised yesterday about the executed oral agreement. But it is the law in California that in order for a previous written contract to be abrogated or modified by an executed oral agreement, the oral agreement must be executed fully on both sides. [584]

Now, there is no evidence here that any oral agreement was executed by Mr. Arenas. Most of the cases cited in their brief are so-called rent cases, where a landlord will temporarily allow the rent to be reduced or will allow a rebate of rent.

One of the cases that I examined, I believe the Burdon case, was a case where the tenant went along for a few months paying the reduced rent, which was about half of the previous rent, then there was a suit for ejectment; and the whole point in that case was whether this oral agreement for the

reduction of rent had the effect of abrogating the lease. The court held that it had abrogated the lease only as respects the part that had been executed only as regards the two or three months during which the reduced rent had been paid and accepted.

The Court: Do you gentlemen want to come back tomorrow?

Mr. Clark: We would like to be heard, your Honor. This involves our own personal integrity, and it is a matter as to which I am unwilling to let this record stand without a reply.

Mr. Taheny: Your Honor, I said at the start that I am not stating that these gentlemen have deliberately said anything that is untrue. I do say that I am satisfied that they are mistaken in their testimony for the reasons I have given.

The Court: Would you like to come back tomorrow, [585] gentlemen?

Mr. Clark: I would, your Honor.

Mr. Taheny: I am just about finished, your Honor, myself.

The Court: You say you must be in San Diego tomorrow, Mr. Brett?

Mr. Brett: I will have to postpone it. I want to get through with this case.

Mr. Preston: Your Honor does not want to stay until 4:30, say?

Mr. Clark: I would rather take it tomorrow.

Mr. Preston: Your Honor has had a full day. It has been rather a hard day.

The Court: You reach a point of diminishing returns, Mr. Clark.

Mr. Brett: I can postpone my trip until Thursday.

The Court: Why not meet at 9:30, then?

Let us meet at 9:30 if that is agreeable, gentlemen. Recess the hearing until 9:30 tomorrow morning. Court will adjourn.

(Whereupon, an adjournment was taken until the following day, Wednesday, March 31, 1948, at 9:30 a.m.) [586]

[Endorsed]: Filed January 3, 1949.

[Title of District Court and Cause.]

Los Angeles, California

Wednesday, March 31, 1948, 2:00 p.m.

The Court: Gentlemen, your arguments have been most helpful to me. I did not think on Monday that by the time you were concluded I would feel clear enough on this matter to decide it, but I feel perfectly clear about it now and there is no occasion to write an opinion on it. If it goes to the upper courts they will take that privilege.

I am sure Mr. Brett agrees and would be the first to say that the Government of the United States can always afford to be fair with its citizens, and that includes attorneys as well as Indians and others. So anything I say which might imply criticism of any action or inaction on the part of the Secretary of the Interior—and I do not have any intention of saying anything at this time—but, if I do, it has no weight in this decision.

As I see the matter, in the first place, it calls for an interpretation of Section 345, Title 25 of the United States Code; and, as I read it in relation to this proceeding, by Section 345 the United States consents to the jurisdiction of this court in equity in a proceeding such as this.

I appreciate that the sovereign cannot be sued without its consent and that consent should be strictly construed. But once given that consent is to be liberally construed to effectuate the purpose. The considerations governing such [2] interpretation of sovereign consent are well discussed in the opinion of Mr. Justice Reed in the case of *United States vs. Shaw*, 309 U.S. 495, particularly at pages 500-502, possibly *et seq.*

This being an equitable action, then, as I interpret it, and the Government having consented to the invocation of the equity jurisdiction of this court, I want to consider at the outset the scope of that jurisdiction.

Equity jurisdiction, as conferred by the Constitution on the Federal Courts, imposes the duty to adjudicate according to equitable rules and principles recognized by the Court of Chancery in England at the time our Constitution was formed. The Supreme Court discusses that in numerous cases. One of the recent cases is *Atlas Insurance Co. vs. W. I. Southern, Inc.*, 306 U.S. 563, at 568.

No such broad jurisdiction is conferred on Federal Courts in actions at law. But here we are dealing, as I say, with a suit in equity and with a proceeding in that suit in the nature of a supplemental

bill for the taxation of costs as between solicitor and client.

As I have said earlier in this proceeding, that power, time-honored and inherent power, of courts of equity or courts of chancery at the time of the adoption of our Constitution and prior to that, is discussed in the scholarly opinion of Mr. Justice Frankfurter in *Sprague vs. Ticonic Bank*, 307 U.S., [3] particularly at pages 164 et seq.

Of course, this is not a *Ticonic Bank* case. This is a case involving what I would construe to be a fund (i.e., the land represented in the allotment) an interest in it. And Lee Arenas' interest is akin to the interest Barnett had in the fund in *U. S. vs. Equitable Trust Co.*, 283 U. S. 378. In my view the same considerations that prompted the court there, as a court of equity, to assess fees as between solicitor and client, apply here.

The only distinction of any consequence between the problem at bar, as I see it, and the problem in the *Equitable Trust Company* case is the basis of the court's jurisdiction or power to bind the United States. In the *Equitable Trust* case, as has been argued, there was no statute under which the United States had consented to be sued in such an action as that action by Barnett, the Indian, through his next friend, against the *Equitable Trust Company*, and more particularly against the *American Baptist Home Mission Society*. The United States intervened, and consent there was, as Mr. Brett has pointed out, construed to arise, as it did, in such cases as *The Siren*, 7 Wall. 152, and *U. S. vs. The*

Thekla, 266 U. S. 328, and others which are cited in 283 U. S. at page 746. There are later cases to the same effect, that where the United States itself invokes the jurisdiction of the court, it to that extent consents in an equitable proceeding [4] that complete justice be done as is the custom. Of course equity, having taken jurisdiction for one purpose, will retain that jurisdiction to do complete justice between the parties.

So I find there is, for those reasons, jurisdiction under 25 U.S.C. Sec. 345 to bind not only Lee Arenas but the United States, as a party to the main action in this proceeding, by whatever determination this court makes in the nature of an award between solicitor and client.

I mentioned the considerations prompting the award in the Equitable Trust Company case. They are also involved in U. S. vs. Anglin & Stevenson, et al., 145 Fed. (2d) 622, a Tenth Circuit case decided in 1944. So that brings us to the question of what costs and what fees should be assessed as between solicitor and client in this case.

Before I proceed, I want to say again that in determining this action under Section 345 of Title 25 to be an equitable proceeding, I am relying in part upon the decision by Mr. Justice Jackson in Arenas vs. United States, 322 U. S. 419, at page 430, and the cases cited there, that case I mentioned yesterday, I believe, namely, Hy-Yu-Tse-Mil-Kin vs. Smith, 194 U. S. 401; and U. S. vs. Payne, 264 U. S. 446. I believe there are other decisions where the point was not expressly raised, in which the very

nature of the action and the relief granted demonstrated that the equitable powers [5] of the court were invoked in a proceeding under Section 345.

So, now the question of what costs should be assessed. If there is a contract between the solicitor and the client that fixes an actual recovery or fixes the rate of recovery, of course, the court will take that contract as governing the maximum amount as long as the amount appears to be fair and equitable. If it were an inequitable contract, a court of equity would not consider itself bound to heed an arrangement, even between the parties, which is inequitable as to amount.

It seems to me that under Section 85 of Title 25 this contract of November 20, 1940, not having been made with the consent of the United States, is void. I believe the Assistant Commissioner had the same idea in mind, although he does not say so, in the letter which was introduced in evidence here from the Assistant Commissioner to Mr. Sallee declining to take any action on the contract. As I see it, the contract clearly deals with, or, in the language of Section 85, Title 25, relates to tribal property in the hands of the United States, or did at the time it was made. However that may be, even were it not for that consideration, the 1940 contract was made subject to the express approval of the Commissioner of Indian Affairs and the Secretary of the Interior. In view of their refusal to have anything to do with it, it is very difficult to know how that contract could [6] ever have been enforced or ever have been carried out.

If it were not for the subsequent conduct of the parties, I would be prepared to say that the contract being made subject to that condition, and that condition never having come to pass, the contract never came into effect. But, as has been pointed out in argument by Mr. Brett, I believe, or Mr. Taheny, these conditions were for the benefit of the parties and the parties treated the contract as being in effect. The petitioners here allege it was in effect up to the time in 1945 when it was superseded, and the other party to the contract, Lee Arenas, contends it is still in effect. So the parties have obviously waived the performance of these conditions.

Even if that were not so, it would seem to me that Mr. Sallee, and Mr. Clark who was with him in all these matters, would be estopped now to assert that their services were worth more than the ten per cent or one-tenth specified in the contract. They placed that valuation upon their services at the time. And there is no showing here that they, having obligated themselves to render those services (assuming the validity of the contract now), ever gave any consideration for a modification.

Without going into a discussion of those attorney fee cases in California, and getting to the point of whether or not the contract was superseded, I say it seems to me it was [7] void in the first instance under Section 85, but the result would be the same in this case, because I am not here to enforce the contract; I am here to take a measure and find an equitable compensation and an equitable taxation of fees between solicitor and client, and this contract

is merely one bit of evidence to aid me in determining what is fair and equitable between the parties.

So I find that petitioners David D. Sallee and Oliver O. Clark are estopped to claim any greater fee than ten per cent of the value of the lands embraced in the allotment to Lee Arenas.

The petitioner, John W. Preston, is not in that position. I feel that Mr. Brett made an accurate analysis of that situation. Petitioner Preston was in no way bound by the 1940 contract, assuming it was in force. If it was in force, then petitioners Clark and Sallee were obligated to perform the services without increased remuneration, and the attempt in the 1945 contract to increase that remuneration to them for the same services was ineffective.

Not so as to Petitioner Preston. His employment was on a quantum meruit basis and his services were rendered on a quantum meruit basis, and I find that he is entitled to 12½ per cent of the value of the lands involved in the allotment as reasonable compensation for his services, and to reimbursement to the extent of \$258.67 by reason of out-of-pocket costs advanced on behalf of Lee Arenas in the performance of [8] his services.

Accordingly I declare a lien upon the allotment and upon all rights conferred by the allotment, and upon the entire interest of Lee Arenas and his heirs in the land embraced within the allotment in the hands of the United States, and upon the rents, issues, profits and income derived from all or any part of the lands embraced within the allotment,

and the proceeds of any land embraced within the allotment in the hands of the United States and, as well, in the hands of Lee Arenas and his heirs, to the extent of an undivided one-tenth interest as to petitioners Oliver O. Clark and David D. Sallee jointly in their favor, and to the extent of an undivided one-eighth interest in favor of petitioner John W. Preston.

Mr. Brett: Would your Honor permit an interruption merely for correction?

The Court: Yes.

Mr. Brett: I think you have overlooked the costs, and I think that lien of Judge Preston's would run for his costs, one-eighth plus his costs, as stated.

The Court: Yes. Thank you. I mentioned that previously but I had omitted it in impressing the lien.

And a further lien in his favor to the extent of the personal advance of \$258.67 by Petitioner Preston. At the time you interrupted I was thinking of the costs of this [9] proceeding.

I find it would be equitable to permit both parties to bear the cost of these proceedings.

The court hereby retains such jurisdiction as may be necessary to enable the court to act upon and determine the time when, and the manner in which, and the method whereby payment of all or any part of the compensation and reimbursement for expenses hereby awarded shall be made or further secured.

In that connection I hope it will not be necessary

to go to that expense, but I will entertain an application for the appointment of a receiver.

Mr. Preston: I do not know as I understood your Honor fully as to the extent of the lien.

The Court: I have declared a lien upon the allotment, upon all rights conferred by the allotment, upon all the lands embraced within the allotment, upon the entire interest in the land in the hands of the United States, and upon all the rents, issues, profits, income and proceeds derived from the land in the hands of the United States.

In other words, it is my view that the court, having jurisdiction under 25 U.S.C. Sec. 345 to render the relief in the main action, has jurisdiction to affect that land, and that the United States has consented to the exercise of full equitable jurisdiction in this action. That is my view of it. [10]

[Endorsed]: Filed April 7, 1948.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Los Angeles, California

Wednesday, February 7, 1951, 10:00 a.m.

(Further hearing on petition for attorneys' fees.)

The Court: Are you ready to proceed, gentlemen?

Mr. Preston: May it please the Court, I think a word of explanation or by way of introduction might be profitable.

This is a re-examination in a proceeding that was heard in this court in the months of February and March, 1948. At that time the Court gave an extended hearing to the matter covering several days. A judgment was rendered in that case from which an appeal was taken by the Government and by Lee Arenas, and the matter was affirmed in part and remanded for further consideration on one issue.

So the petitioners, Oliver Clark, David Sallee, and myself, stand before your Honor asking that the mandate of the court be carried out by the fixation of the amount in dollars that is due us as attorneys in this proceeding, in this case 1321, and that a lien be impressed upon the property involved for the amount so determined.

The order of the mandate and the order of the Court of Appeals apparently requires one step further, your Honor, not merely a fixation of the amount of attorneys' fees in cash, but a fixation of the value of the Indian's interest in the property involved.

The reading of the opinion in that respect is this: [2]

“The District Court should have proceeded expressly to fix the dollar value of the services performed as a basis for the sum secured by the lien, and in so doing should have considered and determined the value of the thing secured by the litigation, namely, the reasonable value of the Indian's interest in the allotted land under the trust patent, as one of the elements to be taken into consideration.”

We have had a similar proceeding before another Federal Judge, Judge Cavanah.

The Court: I have read Judge Cavanah's opinion on it this morning. A copy came to my desk some way. I do not know how I received it.

Mr. Brett: Judge Cavanah directed, your Honor, that a copy be handed to you.

The Court: Very well.

Mr. Preston: And anyway, he undertook to find and did find the value of the allotment, as well as the value of attorneys' fees.

The Court: Do you gentlemen feel that Judge Cavanah properly complied with the mandate?

Mr. Brett: Unfortunately, the Government would have to answer, "No," your Honor.

The Court: Is that because of the valuations or the amounts? [3]

Mr. Brett: In applying the mandate, we feel that he erred in that it is quite apparent from his opinion that in valuing the land, he evaluated it as fee simple, as distinguished from valuing the Indian's interest.

Mr. Preston: It is our contention that that is the only criterion, your Honor.

Now that we have recited these matters by way of introduction, it is then agreed between counsel for the Government and, I would assume, for Mr. Lee Arenas as well, that the record, the reporter's transcript in the proceeding taken three years ago, may be considered as given before the Court today; is that correct?

Mr. Brett: That is correct, yes, sir.

Mr. Ennis: It is agreeable, your Honor.

The Court: In other words, that the reporter's transcripts, all exhibits, all records and files in this case are before the Court for this hearing the same as if they had been reintroduced. Is that the understanding?

Mr. Ennis: That is correct.

Mr. Brett: We are so stipulating.

The Court: Very well.

Mr. Preston: On that record, your Honor, we rest our case in chief, with the privilege accorded us of furnishing the Court an original and supplemental brief that I have prepared or caused to be prepared in this case which handle [4] the issues. Before the hearing date I served a copy of the original memorandum on the Government, and the supplemental memorandum was served yesterday. And I would like to have the privilege of passing an original and a copy of each to the Court in this matter.

The Court: You may hand them to the Clerk.

Mr. Ennis: May I ask Judge Preston if he has a copy for me, your Honor?

Mr. Preston: I will procure you a copy. It is at the office. I do not believe I have it with me. The supplemental memorandum may be considered as our reply to the Government's memorandum, which has also been filed, I assume.

The Court: By the "Government's memorandum," you are referring to Memorandum of Plaintiff and Respondent Lee Arenas and Respondent United States of America in re Hearing to Fix

Attorneys' Fees, etc., filed February 5, 1951?

Mr. Preston: Yes, your Honor. And with that showing insofar as we are concerned, we rest in chief, your Honor.

Mr. Brett: Your Honor, I am going to address you here a few moments before I commence the testimony. I wonder if you could have your bailiff bring the exhibits here, because the primary thing I wanted to do is to examine the witness Gallagher in reference to his report, and I think that that report should be here so that your Honor can [5] follow the examination. If the bailiff could get that record.

The Court: Do you have the exhibits, Mr. Clerk?

The Clerk: No. I have only the last volume of the record here.

The Court: How much time do you expect to take with this testimony?

Mr. Brett: I am not always able to estimate too clearly, but I think half an hour will be probably all I shall take, or less.

The Court: Very well, Mr. Clerk, will you get the exhibits requested by counsel?

Mr. Brett: Now, if your Honor please, first addressing myself to the matters that Judge Preston stated——

The Clerk: May I inquire, Mr. Brett, as to which exhibits?

Mr. Brett: It is the exhibits in the Lee Arenas case 1321-O'C., consisting of appraisal reports, particularly the appraisal report of Joseph Gallagher, but there are other appraisal reports.

I trust your Honor will pardon me if I cough. I still have a little impairment.

In connection with this legal issue which Judge Cavanah has resolved and which your Honor will have to resolve, I believe that we have treated that in the memoranda and I [6] do not want to take any additional time to argue the point.

My purpose will be this, your Honor: I have Mr. Jones here and I expect to interrogate him on the value of the Indian's interest with a hypothetical question on one of two bases. If Judge Preston objects to that and your Honor rules against the Government that it is not admissible, then I would like to adduce it as an offer of proof so I will have the record.

The Court: You wish to make a record of excluded evidence, if it is excluded, is that it?

Mr. Brett: Yes. If, on the other hand, you permit it in, it will be in as evidence.

Other than that, I do not care at this time to trespass on the time of the Court in arguing the issue, because I think it has been briefed quite thoroughly by both sides.

I do feel, however, that before I examine any witness there are a couple of matters that I should offer.

First, Judge Preston has executed a stipulation with me. I must confess that, like Judge Preston and certainly not with any personal intent of doing so, we both ignored the fact that Mr. Ennis was in this case. So, may I just show this to Mr. Ennis a minute? Frankly, I forgot all about it.

Mr. Preston: I have not shown that stipulation to my [7] associates, either.

Mr. Brett: We forgot all about that, your Honor.

Mr. Clark: I am in the same class. I did not see it, either, your Honor.

Mr. Brett: I want to apologize for this delay, but, frankly, I forgot it.

Mr. Ennis: I have no objection to it, your Honor.

The Court: Very well.

Mr. Brett: I have here a signed stipulation, your Honor, between the Government, as representing the United States, and the plaintiff, Lee Arenas, and Judge Preston for the various petitioners, which I should like to file, an original and a court's copy. Shall I hand it up to the Court?

The Court: Just leave it for the Clerk.

Mr. Brett: I will say, very briefly, that the whole extent of it is this: that, for the purpose of this hearing only, the parties have stipulated that each of the properties which are the subject matter of this litigation, the properties which are trust-patented in severalty, are surrounded in part or in whole, as the stipulation recites, by other properties which are likewise trust-patented but to other Indians than Lee Arenas. And there is the reservation in it to protect all rights in connection with this other case which is later coming before your Honor; that [8] this stipulation is for the purpose of this hearing only, and does not in any way prevent the petitioners or anyone whom they may represent, now or hereafter, from urging in other litigation that such trust patents are invalid. In

other words, we are merely stipulating for the purpose of this hearing.

The Court: In other words, the effect of the stipulation would be the same as the effect of an admission made pursuant to Rule 37(b)?

Mr. Brett: That is right, yes, sir.

Next, your Honor, and just for clarification, as I understand it, what we agreed to a few minutes ago was that the reporter's transcript and all exhibits heretofore offered are in evidence.

The reason that I state that is that I noted for the first time yesterday on reading the printed transcript on appeal that apparently Mr. Jones' report and the joint report of Mr. Jones and Mr. Evans were omitted from the transcript.

However, I understand for the purpose of this hearing it is to be considered as a part of the evidence in this case.

The Court: Actually, I assume that the effect of the mandate is to open the findings and the judgment, and direct this Court to continue as if the other hearing had never been interrupted. [9]

Mr. Brett: I think that would be a proper interpretation.

The Court: But out of an abundance of precaution we make these stipulations so the record will be abundantly clear that everything that was in before is re-introduced now for the purpose of this hearing and is in evidence.

Mr. Brett: Yes, sir.

Then, your Honor, as Judge Preston has informed you and as you are informed by the opinion

of Judge Cavanah in the companion case 6221-P.H., we had testimony, and in that case the witness whom I am to cross examine, Mr. Joseph A. Gallagher, Sr., testified at some length as to the methods which were pursued by him in appraising the property, and testified in that case that those were the methods that he pursued in this case.

So, to save time, we have stipulated—and again, I have not asked Mr. Ennis and I am asking his consent on that—that those portions of the transcript of the direct and cross examination and the redirect examination of Mr. Gallagher before Judge Cavanah which recite the methods that he pursued, his qualifications, and other matters as pertinent in this case as well as in that case, but deleting therefrom those portions which they direct to the Della Nicholson or the Eleuteria Brown Arenas case, may be considered as having been given in this case. [10]

I prepared excerpts and submitted them to Judge Preston, and to save time, then, we desire to file those excerpts of that testimony as part of his examination in this case, in addition to the previous testimony in this case.

That is correct, is it not, Judge Preston?

Mr. Preston: No objection particularly.

Mr. Brett: I believe that your Honor will recall——

The Court: Is it stipulated, gentlemen, that this transcript now offered may be received?

Mr. Brett: So stipulated.

The Court: Partial transcript, or a transcript of

the partial testimony of the witness Gallagher in the 6221 case.

Mr. Brett: 6221-P.H. case.

Mr. Preston: I stipulated on the theory it would shorten the cross examination of Mr. Gallagher, maybe, is the reason I did it. I do not know of any value otherwise.

Mr. Ennis: Your Honor, I think the occasions on which I have stipulated to something I have not read or heard are very, very rare. However, I assume that Mr. Gallagher, who took an oath in the other proceeding, told the truth and the whole truth, will tell the same story from this witness stand before your Honor. So I think I am safe, but I will not prejudice my client's rights. I will stipulate that transcripts of his sworn testimony may be introduced [11] here.

The Court: And may be considered the same as if the same questions had been asked him in this proceeding and he had given the same answers.

Mr. Ennis: Yes, I will stipulate to that, because I have observed Mr. Brett, counsel for the Government, cross examine. I imagine he was rather thorough in that cross examination.

The Court: I understand that to be the stipulation, then, of the parties.

Mr. Brett: That is the stipulation, yes.

Mr. Preston: I will say for the benefit of Mr. Ennis that was the shortest cross examination Mr. Brett ever put up in his life.

Mr. Ennis: Unusual.

The Court: I think we had probably better mark

the stipulation being offered this morning as the Government's next exhibit. Do you have a record of the exhibit numbers?

Mr. Brett: I do not, your Honor. I tried to find them a while ago, but there are too many entries on 1321. I do not know what it is. Should we call it "A-1" for the purpose of this proceeding?

Mr. Preston: Call it the second series.

The Court: Yes.

Mr. Brett: Or "AA"? [12]

Mr. Preston: Second series.

The Court: There may be an exhibit.

Mr. Brett: No, we did not go that far. I am sure we did not have any double letters or double numbers.

The Court: Mr. Clerk, do you have a record of the last exhibit received in the former hearing upon these petitions for attorneys' fees?

The Clerk: My record would indicate "N" would be the next number, your Honor.

The Court: "N"?

The Clerk: "N".

The Court: Very well, let the transcript be marked Respondents' Exhibit N in evidence—the stipulation, rather. The transcript will be Respondents' Exhibit O in evidence.

(The documents last referred to were received in evidence and marked Respondents' Exhibits N and O.)

[Printers's Note: Exhibits N and O are set out at pages 627 to 652 of this printed record.]

The Court: Now are you ready to proceed, Mr. Brett?

Mr. Brett: I will be in just one minute, your Honor. I have two other things.

I have heretofore given Judge Preston copies and I have just delivered copies to Mr. Ennis and then I gave you the original, didn't I, Mr. Ennis?

One, your Honor, is a copy of Public Law 322 of the 81st Congress affecting the Palm Springs Reservation, approved October 5, 1949, requires your Honor can take [13] judicial notice, but I think for the record it would be well to put the copy of the Act in as our next exhibit.

The Court: Is there objection to the offer?

Mr. Ennis: No objection on my part.

Mr. Preston: No objection.

The Court: Received into evidence as Respondents' Exhibit P.

(The document last referred to was received in evidence and marked Respondents' Exhibit P.)

[Printer's Note: Respondents' Exhibit P is set out at page 652 of this printed record]

Mr. Brett: Second, your Honor, is Public Law 904 of the 81st Congress, Second Session, approved December 29, 1950, which I offer, then, as Exhibit Q. Would that be correct?

The Clerk: Right.

The Court: Is there objection?

Mr. Ennis: No objection.

The Court: Received and will be so marked.

(The documents last referred to was received in evidence and marked Respondents' Exhibit Q.)

[Printer's Note: Respondents' Exhibit Q is set out at page 654 of this printed record.]

Mr. Brett: With those preliminaries, I would like to have the privilege of calling to the witness stand for further cross examination the witness Joseph Gallagher, Sr.

I might say, your Honor, to recall your attention to this matter, because I realize you have had many matters since then, you will recall that when we started to cross [14] examine Mr. Gallagher at that time you pointed out, or your then ruling was that you were going to consider a percentage of the land, and it was therefore not necessary to go into detail and state the value of the land per se. For that reason I desisted from any cross examination on that matter, but had the right reserved if that became necessary.

The Court: Yes, I recall it.

Mr. Brett: Will you take the stand, Mr. Gallagher?

The Court: With all deference to the Court of Appeals, I still think that you should not have to go ahead with the examination, and I still think that the Court should not be called upon to attempt to place these matters in dollars and cents.

Mr. Brett: That was the opinion of Judge Cavanah, and I do not believe, your Honor, it is proper for me to express my opinion.

JOSEPH A. GALLAGHER,

a witness on behalf of Petitioners, having been previously duly sworn, was recalled and testified as follows:

Further Cross Examination

By Mr. Brett:

Q. Mr. Gallagher, you will recall that you made an appraisal report in writing which has been received in [15] evidence in this case?

A. I do.

Q. And you will also recall that you testified in connection with the Della Brown case before Judge Cavanah this last November? A. Yes, sir.

Q. You understand portions of that testimony have been received here as if restated on the stand today by you? A. Yes, sir.

Q. And I believe you have just had an opportunity of reviewing that testimony, the record of it?

A. The Brown testimony, Mr. Brett?

Mr. Brett: Yes.

Mr. Preston: I do not think he did.

A. No, I did not.

Q. (By Mr. Brett): Mr. Gallagher, in making this report, you recited at the outset that you were doing it for the purpose of an attorney's fee. Did that have any bearing upon the result which you reported?

A. None whatsoever, Mr. Brett, and it is possible that I might have misused the word "determine," the verb "determine." Maybe I should have said "assisted."

Q. You have stated also, on page 3 of the re-

(Testimony of Joseph A. Gallagher.)

port, that the report is in part predicated upon opinions, data, and computations furnished by others whom you deem to be [16] responsible, etc. Did you have a group working under you to obtain this data?

A. I had my son, Mr. Brett, who worked with me at that time. The two of us worked together, and I believe for—oh, maybe two or three days I had my son-in-law, who is in my company as a partner of mine.

Q. After the data was assembled, did you personally check it?

A. Did I check the data on all these properties that I had indicated in the report?

Q. Yes. A. I did not——

Q. Did you personally verify them?

A. I did not check individual properties. I assumed when they came in with their report to the book in the assessor's office there with them, I talked to the assessor. So I will say that I verified those in the assessor's office. Most of the others I believe I did verify.

Q. Did you inspect any of the properties personally?

A. Not all those properties. I did some of the properties, yes.

Q. Will you be able when I ask you, to briefly state which ones you did or did not examine?

A. I shall try.

Q. You have reported in the report that you had [17] knowledge of the fact that the lands which

(Testimony of Joseph A. Gallagher.)

are here involved were subject to trust patents.

A. Yes, sir.

Q. In reporting value here, were you reporting it as the value of a fee simple?

A. That is correct, Mr. Brett. I understand——

Q. That answers my question. And you also report in your report that you had knowledge of the zoning regulations?

A. Yes, sir.

Q. You were informed that those zoning regulations, by Congressional act, were made applicable to the Palm Springs Reservation?

The Witness: Would you repeat the question, please?

Mr. Brett: Will you do so, please, Mr. Reporter?

(Question read by the reporter.)

The Witness: I do not quite understand that.

Mr. Brett: I will ask it another way.

Q. In arriving at your report, did you arrive at it on the theory and with the understanding that these properties were subject to the zoning regulations of the City of Palm Springs?

A. I gave careful consideration to the fact that they were zoned the way the zoning maps indicate the properties to be zoned. [18]

Q. And your answer is, then, that you value them, being subject to those zoning regulations?

A. That was one of my considerations in evaluating the properties. It was not the sole consideration.

Mr. Brett: Mr. Gallagher, I do not believe that

(Testimony of Joseph A. Gallagher.)

is quite an answer to my question. Would you read it, Mr. Reporter?

(Question and answer read by the reporter.)

Mr. Preston: I think that answers it.

Q. (By Mr. Brett): Mr. Gallagher, if you can, I would like a direct answer on this. In fixing your valuations, did you assume that these particular properties were at that time, that is, the time of your evaluation, subject to the zoning regulations which are recited in your report?

A. It is hard for me to answer "Yes" to that, Mr. Brett, for this reason: In the acreage in Section 14 it carries an R-1-A zoning, which is single-family residence, with an area of 7,500 square feet. Now, there are some churches in there, and it looks as though the zoning was broken, the zoning law was broken, the fact that there are churches, unless there was a zoning variance allowing those churches. I did really give very careful consideration to all zoning angles and zoning conditions.

Q. Well, let me ask another preliminary question. In giving this value, you were making certain assumptions, [19] because you were given a hypothetical consideration or situation and arriving at a conclusion based upon that hypothetical situation; isn't that right?

A. Yes, sir.

Q. All I want to know is, in connection with this value of a million-plus which you gave to this property, did you as part of your assumptions assume that these particular lands were subject to the

(Testimony of Joseph A. Gallagher.)

zoning regulations which you report and which are the regulations of the City of Palm Springs, or did you assume that they were not?

A. They were a part.

Q. On page 7 of your report, and also on page 12 of your report, you refer to the utility of these properties for commercial income. What did you have in mind when you used the term "commercial income"?

A. The highest and best use of the property would, in my opinion, entitle the property to commercial income.

Q. By that did you mean business?

A. Yes, under highest and best use, Mr. Brett. I just can't see business on Indian Avenue, in a large area like that. I can see where we will have business in other parts of Section 14, exclusive of Indian Avenue. That was a consideration that I gave, it is true.

Q. Let us put it this way: that in arriving at your conclusion, is the Court and am I to understand that you [20] assumed that at the date of your valuation the properties which are the subject matter of this particular case could have been used and developed for business purposes?

A. Under zoning, no. Under highest and best use, yes.

Q. Well, let us put it this way: Did you in fixing your value assume that the property was then available for use for business purposes?

Mr. Preston: Just a minute. To which we object

(Testimony of Joseph A. Gallagher.)

on the ground it has already been answered, and the further observation, your Honor, that it is not what it is being used for at that time, but it is what its susceptible use is.

Mr. Brett: Your Honor, I have asked the question specifically——

Mr. Preston: What he has in mind as future use——

Mr. Brett: I have asked the question specifically whether he considered it was then available. That is the California rule, if your Honor wants it.

The Court: I have it, whether he considered that a use would then be available.

Mr. Brett: That is right; that was my question.

The Court: Overruled.

The Witness: May I have the question again, please?

The Court: Do you wish it read or do you wish to reframe it? [21]

Mr. Brett: Well, I will reframe it.

Q. My question is this, Mr. Gallagher: In arriving at your opinion of a million-plus dollars as to the property here under consideration, did you assume that the property or any part of it was available—by that I mean could then be used—for business purposes?

A. I did not. Now, may I ask Mr. Brett where on page 7 or page 12, what paragraph you are referring to?

Q. I was referring to the paragraph where you say: "Several large tracts of land have been sub-

(Testimony of Joseph A. Gallagher.)

divided into commercial income and residential developments.” And on page 9—

The Witness: What page is that on, please?

Mr. Brett: That is on page 7.

The Witness: On page 7.

Mr. Brett: And on page 12.

The Witness: Just a moment, please. Where on page 7 did I say that?

Mr. Brett: All right. It says:

“The above facts are furnished for the purpose of establishing substantial and continuing activity in the area where subject property is located. The district is progressing and expanding. Several large tracts of land have been subdivided into commercial income and residential developments. The tracts [22] are close to property under appraisalment;”

You say, “Under the heading, ‘Supporting Data,’ these subdivisions are referred to,” etc.

Then on page 12 you state that:

“The value of land in resort communities depends upon the more intensive use of land as the city grows. Cities satisfy demand for space by either ‘going up’ or by ‘going out.’ They are high at the center and low at the circumference.

“It is unquestionable that the highest, best and most profitable use to which property under appraisalment can be dedicated is that use which caters to public and community needs.”

Q. That “which caters to public and community needs” would be business purposes, would it not?

A. No. I think you are putting the word “busi-

(Testimony of Joseph A. Gallagher.)

ness" into my report. From what you read I do not find it at all.

Q. What do you mean when you use the term "public and community needs"?

A. "Public and community needs" might be a development into some units of multiple type or whatever the community would most require in some type of a development, just like in Truesdale's development, the community almost required that development that Truesdale put in there.

Q. All right. Now, let us just take that a [23] minute. I do not want to take too much time. What did you mean when you used the term—it escapes me now. I will withdraw it. Let us forget it. Did you assume that these properties were available at the date of your evaluation for multiple unit development?

Mr. Preston: I think it is already covered. I object to it on the ground it is already covered.

The Court: In the previous examination, you say, that subject was covered previously?

Mr. Preston: I thought so. I do not know, but I thought so.

Mr. Brett: I do not think so, your Honor. I think his last answer makes that proper. I wanted to frame it in his exact language. Maybe I had better have it read. It was not long.

The Court: As I understand the witness' opinion—and my memory may be faulty—but, as I understood, his opinion was predicated upon the assumption that the property would be free from the

(Testimony of Joseph A. Gallagher.)

restrictions imposed by law upon Indian ownership. Is that correct, Mr. Gallagher?

The Witness: That is correct, your Honor.

The Court: That applies to all the restrictions imposed by Indian ownership, does it not?

The Witness: Yes, sir.

Q. (By Mr. Brett): Do you mean aside from the zoning [24] laws?

The Court: I am speaking of the restrictions imposed merely by reason of Indian ownership.

Mr. Brett: I am only addressing myself now, your Honor, in this examination to the restrictions imposed by the zoning laws. I want to find out whether he assumed that any part of these lands may be used for multiple units under the zoning laws.

The Court: Hadn't we covered that about the zoning? I have a recollection Mr. Gallagher testified that he did consider all the zoning laws of Palm Springs in effect as applicable.

Mr. Brett: That is correct, too, all the lands, for the purposes of his opinion.

The Court: Because, if they came out from under the Indian restrictions, they would be subject to the same restrictions that any other land would be subject to.

Am I correct, Mr. Gallagher?

The Witness: You are, your Honor.

Mr. Brett: That is entirely correct, your Honor. But in connection with that, I want to find out if it is not a fact that he has assumed in connection with

(Testimony of Joseph A. Gallagher.)

these properties under the zoning law, assuming you or I owned them, that they could be used for a multiple residence purpose.

The Court: You may answer that question. [25]

A. Under the highest and best use, yes. Under the zoning requirements, no.

Now, may I explain that, Mr. Brett? Zoning ordinances are not serious ordinances in communities. They are placed on districts as protective measures, that is true. But then conditions happen where people may want a church in there, they may want a school in an R-1 district. So that there necessarily will become a zone variance. We have that all over, not only Los Angeles County, but other counties, too.

The Court: You assumed, then, did you, Mr. Gallagher, is it fair to say, that the authorities would make such variances as might be necessary to permit the highest and best use of the land?

The Witness: I did, your Honor. I did.

Q. (By Mr. Brett): Mr. Gallagher, in your experience as an appraiser haven't you learned that environment to the land is an important factor?

A. I have.

Q. You inspected these particular properties, did you not? A. I did.

Q. Did you not as a part of that inspection learn, and have you not reported in your report, that this area in Section 14 which you valued at \$20,000 an acre—[26] that is these two lots—were surrounded by the same type of slum dwellings and

(Testimony of Joseph A. Gallagher.)

low-class improvements that these particular properties were used for?

A. If those dwellings were not there, Mr. Brett, in my opinion the per acre value would be much in excess of \$20,000 per acre. Because I am working in the slum housing projects in Los Angeles now, and it is surprising what the appraised valuations on some of those properties are, even though the environment is very, very poor.

Mr. Brett: I move to strike that as not responsive to my question. I would like to have an answer to the question.

The Court: Did not the witness answer the question?

Mr. Preston: I think he did.

Mr. Brett: I do not think so, your Honor.

The Court: The motion is denied.

Mr. Preston: It is implied in his answer.

Mr. Clark: He answered it directly.

Q. (By Mr. Brett): Now, Mr. Gallagher, there is a reference in your report on page 8 which states that: "The improvements are very poor" on Section 14, "and lend themselves to a detrimental influence upon neighboring properties. They are classed as shacks and assume the appearance of a slum district. The streets are unimproved; sanitation facilities are faulty; the type of people belong [27] to another district. They fall below the income group and social status of people of the neighborhood."

And thereafter you gave certain ratings in which

(Testimony of Joseph A. Gallagher.)

you arrive at a total rating of physical structures of 22 points. What did you have reference to? I mean what was the "22" in reference to? Was it in reference to some one hundred per cent?

A. In reference to one hundred per cent. Now, you will remember that I appraised the land and I indicated in my report that my assignment for appraisal of the properties was for the land only, not for the improvements. I did not appraise those improvements. I examined the improvements. I did not go inside. It is not necessary for an appraiser at times to go inside. He can pretty well tell by looking at the structural conditions that they were not in conformity with the improvements in the other sections surrounding 14 by any means at all.

So that, using 100 as my index, if the improvements were standard and the improvements had been well taken care of and, say, they were fifteen years old, I would not take the standard depreciation figure of two per cent a year for the first ten and 1.775 the next five years, thus depreciating 15 per cent a 10-year building. Maybe I would depreciate that building only 7 or 8 per cent by reason of the care. But I found those buildings in very, very poor shape, and it [28] was just something which was considered by the appraiser in appraising the property.

Q. Do I understand your testimony is that the lands that immediately surround these two properties that are in Section 14 that are here under

(Testimony of Joseph A. Gallagher.)

consideration were not improved and used in the same manner as those particular lands?

A. You mean lands adjacent and surrounding 46 and 47 and Section 14?

Q. No. My question is this: You are referring now, or I am referring now to the two lots in Section 14 that were allotted Lee Arenas.

A. Yes, sir.

Q. Is it your testimony that the lands which immediately surround it were not both used and improved in the same manner as the Lee Arenas lots?

A. My testimony is not that, Mr. Brett.

Q. What is your testimony in that respect?

A. I referred to, when I spoke about the standard and conventional and proper developments, the developments I found in Sections 11 and 15—Section 11, which is immediately north of 14, and Section 15, which is immediately west of 14. I was not referring to the improvements in Section 14. They conform with the improvements that I found on Lots 46 and 47. They do not belong in Section 14, [29] in my opinion. They should be removed.

Q. Did you value these two lots in Section 14, assuming that they would be changed, or, rather, that they had been changed so that they were similar to the lots in Section 15, which is the central part of Palm Springs?

A. Under the highest and best use, Mr. Brett, lots in Section 14 are susceptible, in my opinion, to

(Testimony of Joseph A. Gallagher.)

the same type of development as you find in Section 11 and also in Section 15 and Section 23.

Mr. Brett: Will you read the question, Mr. Reporter?

I think, your Honor, that question can be answered yes or no and then he can add, if he desires.

Mr. Preston: He answered it.

The Court: I am not familiar with the section numbers, those section numbers 11, etc., mentioned by the witness. Aren't they the business center of Palm Springs?

Mr. Brett: 15 is the very center, the heart of the business district of Palm Springs.

The Court: Then hasn't he answered your question?

Mr. Brett: I do not think so. I want him to tell me——

The Court: I understood his answer was, in effect, "Yes." That is the way I understand it.

Mr. Brett: Well, if your Honor understands it.

The Court: Is that a fair statement?

The Witness: Yes, it is, your Honor. [30]

Mr. Brett: All right, with that answer I am satisfied.

Q. Mr. Gallagher, if you will turn to page 14? On page 14 you state that in arriving at your opinion you gave no consideration "to the so-called 'potential value'—set up by promoters and others who employ hypothetical improvements and rental returns."

Do I correctly interpret that statement to mean

(Testimony of Joseph A. Gallagher.)

that you gave no consideration to the value of the property except that which existed at that particular time? A. No, Mr. Brett.

Q. What do you mean?

A. When I use the word "speculative," I use that advisedly. Promoters who would step into Section 14—that is a promoter, not a good, honest, substantial subdivider—a promoter might step in there and have ideas that the returns will be fantastical returns, anything of a conjectural nature, anything of a guessing nature. One does not have to guess, as I see it, in any type of development in Section 14, if the development is proper. It lends itself to what you find in Section 11 immediately north of 14 and Section 23 immediately south of 14.

Q. Well, now, just a minute. Section 11 immediately above Section 14 is developed into both big hotels along Indian Avenue, such as the Ambassador Hotel; that is true, [31] isn't it?

A. That is true.

Q. Or the El Mirador Hotel?

A. That is true.

Q. And it is also developed into fine homes that run many acres in extent? A. That is true.

Q. Did you then, in fixing your value of these two 2-acre parcels in Section 14, assume that they were available at the date of your valuation, or in a reasonable period thereafter that was foreseeable, for a change-over into that development?

A. I assume that they were susceptible to the same type of development that you find in Section

(Testimony of Joseph A. Gallagher.)

11 immediately north, for this reason: You go down to the southeast corner—the southwest corner of Section 14, and you will find as nice a type of development along service station lines as you will find in almost any part of Palm Springs.

Q. Let me stop you there.

A. The Standard Oil. Well, I am just talking about what kind of development can go in there. You have Standard Oil with a nice, beautiful Standard Oil station, and you have Sips and Snacks Restaurant, which is very well kept, a very fine restaurant; then you have got six houses—[32] I am just talking about Section 14—you have six houses right on Ramon, just east of Indian Avenue and Ramon, that are very, very attractive houses, in Section 14; and you move a little bit east of that and you have got the Dakota Motel, which is somewhat in conformance with other inns and motels in Palm Springs; you have got a driving range; you have got other nice developments in there. The whole section, in my opinion, can develop just the same as 23 and 11 and the other sections, Mr. Brett, because south and west you have where King Gillette and others are living. Now, that is farther away from the heart of the city. I would not under any consideration penalize Section 14 for faulty development. It does not belong there. Section 14 is entitled to the best that it can receive and it should receive that.

Q. Then you have valued it, in other words, as

(Testimony of Joseph A. Gallagher.)

it would be if it was changed as you have just described?

A. Under the highest and best use—the only use that an appraiser should consider an appraisal—I consider how it would develop.

Q. And your answer to my question is?

A. No.

Q. Yes? A. No, no.

Q. All right.

A. My answer is no, for this reason: If the [33] highest and best use was in there, I would not under any consideration come in \$20,000 an acre. I might come in \$15,000, \$20,000 or \$25,000 a lot, but not an acre.

Q. I want to take just a minute on what you have said. The properties you have described there are down on Indian Avenue, which is the second most important business street in Palm Springs, aren't they? They face right on Indian Avenue?

A. Which properties are you referring to?

Q. The properties which you refer to as the Standard Oil station.

A. That is at Indian Avenue and Ramon, yes, sir.

Q. The other properties you described, too, are on Ramon, which is a major east-and-west thoroughfare at the south of Section 14.

A. Well, I would not call it "major," Mr. Brett. I would call it secondary, because when you get farther east——

Q. At any rate, it fronted on that street?

(Testimony of Joseph A. Gallagher.)

A. That is correct.

Q. How far are these lots from either Indian Avenue or Ramon? A. Which lots?

Q. The nearest point? The lots that you are referring to, which are lots——

A. 46 and 47. [34]

Q. ——46 and 47?

A. I should say a half a mile.

Q. Half a mile away from the property on Ramon?

A. More or less. No, no. I am wrong. About a quarter of a mile.

Q. On page 14 you say you give consideration to “neighborhood value,” which is the value that depends upon the neighbors. I take it by that you mean you give consideration to the development immediately around these properties. Is that what you mean by saying you gave consideration to neighborhood value?

A. Yes, properties immediately around Lots 46 and 47, and, too, the properties in these other sections which are adjacent to Section 14. That is neighborhood. A half a mile away, a mile away, I would consider neighborhood.

Q. All right. Now, you say you give consideration to sale value—sales in the neighborhood which tend to establish a level of value.

A. That is correct.

Q. Was that one of the principal elements in your value?

A. No, Mr. Brett, it was only one of the in-

(Testimony of Joseph A. Gallagher.)

cidental elements. All these were just incidental. They were considered.

Q. Was it your view that the sale value and the [35] neighborhood value were different?

A. They might be different.

Q. Then you say you gave consideration to "true value," which you define as "the buyer's justification to pay for property." Did you mean by that, that it was your conception that the price which a buyer would be justified to pay was a different value than the value as fixed by sales in the area?

The Witness: Will you repeat that question?

(Question read by the reporter.)

A. I did not.

Q. You conceive them to be the same?

A. Not necessarily. You may have a special buyer who would want the property for a special purpose, and he would be inclined to pay more for that than someone who did not want it for a special purpose.

Q. And you utilized that in fixing your value?

A. That was one of my considerations.

Q. Then you say you gave consideration to the "utility value," which you define as "the reasonable, fair, and warranted utility value which the purchaser should pay for the use of the property to good advantage." When you used that term, did you mean that he could get the zone changed and could clear out the surrounding areas from their present use? [36]

(Testimony of Joseph A. Gallagher.)

A. That was considered. When I considered the utility value, the best way for the property to be developed in a manner different from the way the property was improved at the time of the appraisal.

Q. And that was given weight in arriving at your consideration?

A. Just one of the considerations.

Q. It was given weight?

A. Just one of them. You have to——

Q. Is your answer yes?

A. My answer is yes.

Q. You have stated also, on page 15, that you considered “fair cash market value,” which you define as “the right of the landowner to receive the highest cash market value for the part taken, considered as the part of the whole.” What did you mean by that?

A. That should never have been there, Mr. Brett. I have been in so many condemnation matters that that slipped up, because there is no condemnation here at all. But the fair cash——

Q. That was not your definition of market value?

A. Well, my definition of market value?

Q. No. Pardon me.

Mr. Brett: Will you read my question, Mr. Bargion?

(Question read by the reporter.) [37]

Mr. Brett: Do you understand the question?

A. That was not my definition of market value.

(Testimony of Joseph A. Gallagher.)

What do you mean, cash market value? Fair cash market value is not my definition of market value.

Q. The definition which you have set forth on page 15, which says: "The right of the landowner to receive the highest cash market value for the part taken, considered as the part of the whole" is not?

A. That is not market value.

Q. Then thereafter you use the term "use value." You say, "The worth of subject property in the market, viewed with reference to the uses to which it is adapted." In using the term "to which it is adapted," did you mean which it was then available for?

A. Yes, which it was then available for, because market value takes into consideration the uses and purposes for which the property is adapted or is capable of being used.

The Court: You mean the highest and best use, Mr. Gallagher?

The Witness: That is correct, your Honor.

Q. (By Mr. Brett): Did you conceive there was any difference in the market value and in the use value as you have defined it here?

A. Oh, yes, there is a difference there, because under use value the worth of the property in the market is [38] valued with reference to the uses to which it is adapted. Now, you may have a different type of a buyer and a different type of a seller. Under this definition of use value, as I understand use value, we give a strong consideration to the owner's concept of what he should receive, more so than

(Testimony of Joseph A. Gallagher.)

to the buyer's concept of what he should pay. That is not market value.

Market value, you have got the buyer and the seller, each one understanding the terms and conditions of sale, and each one being willing and each one understanding. These were only considerations, Mr. Brett.

And, may I say again, any appraiser who appraises property, who does not give that property every consideration that is possible, is at fault, he is at error. He should not be an appraiser.

Q. Now I want to ask you another question. Next, on page 15, you referred to your consideration of the "value for subdivision purposes," which you define as "the value of subject property as a subdivision, plus an increased value caused by suitability for dividing into city lots and small acres." There are other things I won't refer to. Let us stop there.

The Court: How long is this going on, Mr. Brett? It is not helping me. It may be good for the record on appeal or something. [39]

Mr. Brett: I think, your Honor, it will help you when I get past this in a few minutes, when I get through in fifteen minutes.

The Court: I understand from this witness' statement that whatever he says in that report is merely just to buttress his opinion expressed upon the assumption that this property will be available for non-Indian use, a way of saying "free from the restrictions imposed by Indian ownership."

(Testimony of Joseph A. Gallagher.)

Mr. Brett: But he goes far beyond that, your Honor. He also assumes it will be available for uses which even a white person or anybody else could not put it to at this time. This property, by his own report, could not be used under this existing law.

The Court: He has explained that. He thought the highest and best possible use of the property warranted the city officials or the authorities in power to make the necessary zoning variances to permit that kind of use. What more can be said, more than that?

Mr. Brett: Your Honor, I think there are a couple of other things I want to find out. I am sorry.

The Court: I do not want to limit you, but it is a quarter of twelve.

Mr. Brett: I will get through with this witness before twelve o'clock, definitely. [40]

The Court: I thought we were going to finish the testimony this morning. You told me in thirty minutes we were going to finish this testimony. Let us finish it before we go to lunch, unless there is some particular reason not to, Mr. Brett. You estimated for me thirty minutes.

Mr. Brett: I wanted to ask certain questions, but I will pass them; but I do want to ask a couple more.

Q. Mr. Gallagher, as part of the paragraphs which I read, you say: "No consideration was given to a problematical value which the present owners

(Testimony of Joseph A. Gallagher.)

might receive after subdivision had actually taken place."

Is my interpretation correct on that, that you meant in evaluating this land you considered it was available for subdivision, that is what you assumed, but you did not give it the value it would have if it was already subdivided?

Mr. Preston: To which we object upon the ground we had been talking about Section 14 and subdivision may not refer to that, because there are three or four other tracts involved in that location.

The Court: Overruled. You may answer.

The Witness: May I have the question, please?

The Court: Oh, let us not go over this. This is just too much, Mr. Brett.

Mr. Brett: Your Honor, this is very important to me. [41] I am sorry. I think I can point it out in a minute, but it takes a little time.

The Court: It is in his report, isn't it? Can't you argue it?

Mr. Brett: I don't know. I am not sure that is what he means. I want to be sure.

The Court: Did you value it for subdivision purposes?

The Witness: I did not.

The Court: As if it were already subdivided?

The Witness: I did not, your Honor.

The Court: Does that answer your question?

Mr. Brett: All right, your Honor.

Q. The reason you did not do that, Mr. Gallagher, was because you knew from your experience

(Testimony of Joseph A. Gallagher.)

the retail value, after it was subdivided, of separate lots is entirely different from the value of acreage before it is subdivided; it is considerably more in a retail price, isn't it? A. That is correct.

Q. As a matter of fact, there is a mark-up of probably three times in the retail sale of separate lots as distinguished from the price that one would have prior to subdivision?

A. That is not correct, Mr. Brett.

Q. What would you say the mark-up would be?

The Court: It depends upon the land, Mr. Brett, how [42] much it is, how much it would cost to subdivide.

Mr. Brett: Well, isn't there a mark-up?

The Court: Yes. I will take judicial notice of the fact that there is a considerable mark-up between raw acreage and a subdivision where the curbs, the streets, and gutters are in.

Mr. Brett: All right. Then I just want to ask a couple more questions.

Q. Mr. Gallagher, will you look at page 18 of your report? Page 18 of your report states that you have evaluated the land in Section 14, the four acres, based upon your consideration of certain lot sales which you thereafter delineate; is that not true? A. That is correct.

Q. And the first one that you have there is designated as "A" and is described as "Lot 8, Warm Sands Park Tract"? A. Yes.

Q. Is it not a fact that your own figures there demonstrate what you have done is to take a par-

(Testimony of Joseph A. Gallagher.)

ticular lot, sold after it was subdivided, determined the amount of acreage in that lot, and then break it down into square feet, and then because an acre has 43,560 square feet, multiplied the square footage that you there arrived at by 43,560, and in that manner arrived at the acre value? [43]

A. That is not correct, Mr. Brett. I did not take a lot just because that lot favored me in my analysis of the market value of the property under appraisal. That would be so unfair and unjust——

Q. Just a moment. I am going to pass that. You said that is not the way. I am going to ask you one other question.

Do you recall in your testimony which we have over here, as part of the Della Brown testimony, you stated in effect that you found a group of values of surrounding sections, added them together and divided them by four? Do you remember that?

A. I took, oh, possibly 50 or 60 properties, the assessed value of the properties in the sections around Section 14 and Section 26, and about the same number of properties that had been sold or had been listed for sale around those sections, and from that analysis I was satisfied in my mind that my opinion of those values as given in my report was correct, and I still am.

Q. All right. Now I want to ask you a couple of more questions and I will be finished.

Will you look at page 24, Mr. Gallagher, of your report? Will you look at item 44 therein? Do you find it? A. I do. [44]

(Testimony of Joseph A. Gallagher.)

Q. Is that not a report of the same lot, Lot 8, Warm Sands Park Tract?

A. That is possible. When you have a hundred and some-odd comparables, that might have gotten in. I do not see how that is going to affect my comparables at all. It is just a repetition of one lot.

Q. Will you wait just a minute? In your report, on page 18, you report the sale of that lot at \$8,820. In your report, on page 24, you report that lot as having been sold for \$5,000. Isn't that true?

A. Well, there may be some mistake there. I can't remember just why I had on page 18 Lot 8, Warm Sands Park Tract. The two tracts are the same. That looks like Lot B, to me, Mr. Brett, instead of Lot 8, on my sheet here.

Q. All right. Now I want to call your attention——

A. I don't know. I can't remember back that far.

Q. I want to call your attention to a couple of more, Mr. Gallagher. Will you look at page 18 and the number "E" or letter "E," Lot 1 of the Warm Sands Tract? A. Yes, sir.

Q. You report that sale at \$4,680 and compute the acreage value on that basis; is that not correct?

A. Valued at \$4,680, that is correct.

Q. Will you look at page 24, item 47?

A. Yes, sir. [45]

Q. There you report that sale at \$4,200, do you not?

A. No. In one of these instances the figures

(Testimony of Joseph A. Gallagher.)

were based on the assessed value of the property; in the other instance it might have been what the property sold for. I do not remember that now. But I think you are confusing my assessed value approach to value and the sales and solicitation approach to value or market approach.

Q. All right. Now I want to ask you one more. Will you look at page 19, under "Q"? You report Lot 4, Block 24, as valued at \$87,180, is that not correct? A. Yes, sir.

Q. All right. Is not that the same property that you report as number 32 on page 24?

A. That is. My answer would be the same as my answer to your other question.

Q. Your report there is \$75,000?

A. That is right.

Q. Can you tell the Court which one of the various discrepancies you used, whether it was the list you put on pages 18 and 19 or whether it was the list you put on pages 23 and 24?

A. I try not to use any discrepancy, Mr. Brett. Under the assessed value, with the factor that the assessor uses, would indicate one value, if that property were [46] listed for sale for \$75,000; and under a factor of 6 or a factor of 5, used by the assessor's office, it shows \$82,000. I do not see where there is anything wrong in the report.

Q. I have one final question. Can you tell me any sale that you discovered in your entire investigation of a 2-acre piece—I mean an acre piece at \$20,000, or a 2-acre piece at \$40,000, or any other

(Testimony of Joseph A. Gallagher.)

combination of acreage in which the acre price was \$20,000, anywhere in Palm Springs?

A. I think you asked that question before and that is in the transcript, Mr. Brett. But would you mind repeating that and I will be happy to answer it again for you?

The Court: Please read it, Mr. Reporter.

(Question read by the reporter.)

Mr. Brett: I am talking about a sale.

A. My answer to that is "No," and my explanation is that there is no one—there was no one-acre piece and no two-acre piece available for sale or purchase at the time of the appraisal that I was able to find.

Q. In your investigation did you find any property—

The Court: Mr. Brett, you have put about fourteen questions since you announced you were through, and this last one you called "the final question." Now you are putting another one. How long is this going to continue? [47] If you have an important question, I won't preclude you, but you are lulling us into a false sense of security here.

Mr. Brett: I am sorry, your Honor.

The Court: By announcing each time that you are through. If you have a question you wish to put, you put it.

Mr. Brett: You Honor, I never want to offend this Court.

The Court: No offense.

(Testimony of Joseph A. Gallagher.)

Mr. Brett: I thought the Court at least would be interested in knowing whether there were any sales a man could find anywhere in Palm Springs at the fantastical prices he has told about.

The Court: I believe I recall that question from the last hearing and the answer was "No." I may be in error, but I have a very definite recollection that you asked that question before, either of this witness or some other witness, and they said, "No."

Mr. Brett: Then, with your Honor's permission, it will be passed. But I would like to ask one final question, and this is final.

The Court: Very well.

Q. (By Mr. Brett): Mr. Gallagher, taking any of the figures which you have given here as the acreage value of any portions of the lands that are here under consideration, [48] did you in connection with your investigation find any transaction that had resulted in a sale for so much money per acre as any amount that you have reported here as the value of these properties?

A. It is very hard to answer that question. I mention that there are no 1-acre parcels listed for sale nor available for sale that I was able to find.

The Court: Can't you just say, "No"?

A. No. I answer that no.

Mr. Brett: That is all, I think, your Honor.

Mr. Preston: May I ask just one question?

The Court: Yes.

(Testimony of Joseph A. Gallagher.)

Redirect Examination

By Mr. Preston:

Q. Have you rechecked your valuation since you made it in 1947? A. I have, Judge.

Q. Are you satisfied with it today, as you were then? A. Definitely.

Mr. Preston: That is all.

The Court: Do you still stand on the report which is in evidence?

The Witness: I do, your Honor. [49]

The Court: Very well. Anything further of Mr. Gallagher?

Mr. Brett: No, sir.

The Court: You may step down. Your next witness.

The Witness: Thank you, Judge.

Mr. Brett: May I call Mr. Jones?

The Court: Yes.

DONALD C. JONES,

called as a witness on behalf of Respondents, being first duly sworn, was examined and testified as follows:

The Clerk: You have been heretofore sworn, Mr. Jones, have you not?

The Court: Didn't you appear and testify?

The Witness: I did on the Della Brown case, your Honor. Oh, I did in this case, also.

The Reporter: I know that Mr. Jones' report was copied into the transcript, but I do not believe

(Testimony of Donald C. Jones.)

he was sworn and testified orally at that previous hearing.

The Court: As I recall and the reporter suggests, Mr. Jones' report was copied into the record.

Mr. Brett: His report is in, but there was no testimony.

The Court: There was a stipulation or a question and [50] answer document received.

The Witness: I believe it was received while I was on the stand.

Mr. Brett: Yes, that is correct, your Honor.

The Clerk: That is Exhibit F, the testimony of Donald C. Jones as to his qualifications as an expert real estate appraiser.

Mr. Brett: Yes.

(The witness was sworn by the Clerk.)

Mr. Brett: Mr. Clerk, will you hand this up to the Court? I have an original and a copy of a hypothetical question, so counsel can object if he is so minded.

The Court: Has the witness read the question?

Mr. Brett: Yes. I am merely going to ask him the answer.

The Court: The question will be deemed repeated and will be copied into the record at this juncture as having been propounded to the witness. Let the question be marked as an exhibit, Mr. Clerk, as Respondent's Exhibit T.

Is there objection to the question?

Mr. Preston: I think not.

The Clerk: This will be R, your Honor.

(Testimony of Donald C. Jones.)

The Court: R?

The Clerk: Yes.

The Court: Yes. I am sorry, Exhibit R. [51]

(The document referred to was received in evidence and marked Respondent's Exhibit R.)

(The hypothetical question, "Exhibit R," is in the words and figures as follows:)

Hypothetical Question.

Assume that the interests of Lee Arenas in the 2-acre parcels, the 5-acre parcels, and the 40-acre parcels, described in the complaint in case No. 1321-O'C Civil, as the Lee Arenas and Guadalupe Arenas selections, consist of the vested right to receive at a subsequent date which is not now known, providing that he does not die in the meantime, a conveyance in fee simple absolute to such property, and that until such conveyance has been made and delivered he has the right to personally use and occupy all of such property, and has the further right to lease such property for grazing or farming purposes for not to exceed ten years, providing that such lease is first approved by the Secretary of the Interior of the United States or his authorized representative, and he has the right to lease such property to a third party or parties, who are not Indians, for business purposes, for not to exceed five years, providing that such lease is first approved by the Secretary of the Interior of the United States or his authorized representative; that he is entitled to receive the income derived from such leases unless the

(Testimony of Donald C. Jones.)

Secretary of the Interior of the [52] United States shall determine, in his discretion, that such income shall be held in trust for his benefit by the Office of Indian Affairs; that the present trust period expires on May 9, 1952, but may be continued for periods not to exceed 25 years without his consent and at the sole discretion of the President of the United States; that since December 15, 1933, all trust patents in severalty have been extended, prior to their expiration, for 25-year periods, by a general Executive Order issued by the President of the United States, regardless of his political affiliation, and there is no present record of any change in the policy of the present incumbent of that office; that, in the event of his death before he receives such patent in fee simple and free of restrictions, his rights will descend to his heirs at law, except that with the consent and approval of the Secretary of the Interior of the United States, he may dispose of the same by Will; that until he received a patent in fee simple free of restrictions, he may not sell and may not encumber his interest under such trust patent to any extent or for any purpose, and assume that it is such interest that would be transferred by a conveyance and that the purchaser would acquire such interest subject to the same conditions, what, in your opinion, would be the fair market value of such interest in said 2-acre tracts; what, in your opinion, would be the fair market value of such [53] interest in said 5-acre tracts; and what, in your

(Testimony of Donald C. Jones.)

opinion, would be the fair market value of such interest in said 40-acre tracts?

A. The answer, in my opinion, your Honor, is that the value of the trust patent as to Lots 46 and 47 would be \$12,800, that two lots together; the value of Lots 39 and 40 would be \$40,000; and the value of the 80 acres, the northwest quarter of Section 26, the value of the trust patent on that property would be \$35,000; or a total of \$87,800.

Q. (By Mr. Brett): Now, Mr. Jones, has there been a change made in your value of Lots 46 and 47, and 39 and 40 as to the trust patent value?

A. Yes, there has been.

Q. As distinct from that which your report shows, as filed in 1947? A. Yes, sir.

Q. Will you explain your reasons for the change?

A. My reason for the change is that the circumstances applying under the trust patent have been that, although the property could be leased, it was subject to a 30-day cancellation clause. I understand that that requirement has been lifted and the property can now be leased for a 5-year period without cancellation clauses therein.

Q. Mr. Jones, have you had experience in subdividing properties in Southern California? [54]

A. I have on numerous occasions.

Q. In connection with your activities have you also investigated subdivision properties for the purpose of appraising them?

(Testimony of Donald C. Jones.)

A. Yes, sir.

Q. As a result of that, have you formed an opinion as to the approximate percentage of increase in the value of property if you lump the retail value of the lots in a subdivision as compared to the wholesale price for a subdivision?

Mr. Preston: That is in violation of our understanding.

The Court: Is there objection?

Mr. Preston: I object to it on the ground——

Mr. Brett: I did not hear the objection, your Honor.

The Court: He says it is a violation of some understanding.

Mr. Preston: It disregards the understanding that he would not go into this hypothetical question, which was the only thing he was going to put Mr. Jones on for. Now he is going into the specifications.

Mr. Brett: I will put it this way: I do not understand that I am, but I never want to be violative of any understanding. If Judge Preston says so, I would not even want to violate what he thinks. But I had not so [55] understood or recalled. I am not going to violate anything counsel says I have made an arrangement on.

The Court: Gentlemen, so the record will be absolutely clear—it may be clear—it is understood that Mr. Gallagher's testimony as to values and the other witnesses' testimony as to values, even though heretofore given, embody opinions as to

(Testimony of Donald C. Jones.)

value of the present. Is that your understanding?

Mr. Brett: No, that is not true, your Honor, because my witnesses testified last November and would testify now that the values are different. But I understood Judge Preston and I were going to rely upon that other testimony, and I am not going to offer it.

Mr. Preston: Just as it stands, with the exception of this hypothetical question.

The Court: As I understand it, the valuations must be determined as of now. Is that your understanding of the mandate?

Mr. Preston: That is the reason I asked Mr. Gallagher if his opinion was the same now as it was then.

The Court: That is what prompted me to ask the question. As I understand—and I want to be sure that the record is clear and that there is no misunderstanding about it—that Mr. Gallagher in effect brought his testimony up to date, and any opinions he expressed were opinions as [56] at present. Is that your understanding of the record, Mr. Brett?

Mr. Brett: I believe that is the record, yes, your Honor. But I am in this unfortunate position now: I did tell Judge Preston that I was only going to produce Mr. Jones for the limited purpose. In fact, I thought originally, until I discovered that there were certain factors to change Mr. Jones' testimony about trust patents, and also discovered that there

(Testimony of Donald C. Jones.)

was something in the copy on file which was not in my copy of his report with reference to trust patents, I told Judge Preston that I felt that I had to have some testimony under our theory as to the value of the Indian's interest in that trust patent.

I feel this: I feel I should at least ask to be relieved from the stipulation, even if I get it in the light of what has now taken place, because I know Mr. Jones' values are different.

The Court: Are the values you have given your opinions as of now?

The Witness: No, sir, your Honor. They would be slightly less.

The Court: As of what date?

The Witness: They would be slightly less.

The Court: As of what date are these figures given?

The Witness: These figures are as of 1948, [57] your Honor.

The Court: In other words, the opinions you have expressed in response to the hypothetical question, Exhibit R, are values, in your opinion, which existed in 1948?

The Witness: Yes, sir.

The Court: Today you would say they were slightly less?

The Witness: Today I would say they were slightly less because of the falling off of the market in Palm Springs.

The Court: Anything further from Mr. Jones?

(Testimony of Donald C. Jones.)

Mr. Brett: As I say, in view of the fact that we are faced with this situation, I do not like to make a stipulation and to ask the witness to agree that his values are different. So may I, to that extent, be relieved?

Mr. Preston: I am going to relieve you as far as I am concerned.

The Court: The witness has just testified that the values would be slightly less today.

Mr. Preston: Slightly less. He testified to percentage before.

Mr. Brett: May he just testify to the percentage less, and that will be sufficient?

The Court: Yes.

The Witness: I think it is about ten per cent, your Honor. [58]

The Court: Ten per cent less today?

The Witness: On the general average of the real estate market, yes. I may make it clear, your Honor, that I have not checked any sales since 1948 in Palm Springs, but I have interviewed several brokers down there and discussed the general trend of the market.

The Court: And your opinion is that the comparable valuations as of the present would be approximately ten per cent less?

The Witness: Yes.

The Court: Than the valuations you expressed as of 1948?

(Testimony of Donald C. Jones.)

The Witness: That is my opinion, your Honor, yes, sir.

The Court: Any further questions of Mr. Jones?

Mr. Preston: Yes, I want to ask him two or three questions.

The Court: I take it Mr. Gallagher is still here. Would you come forward, Mr. Gallagher? I want to clear the record on the testimony.

Are the opinions expressed in your report the opinions you hold as of the present value at this time?

Mr. Gallagher: They are, your Honor.

The Court: We asked you that in substance, but I wanted the answer to be absolutely clear.

Mr. Gallagher: That is correct, your Honor. [59]

Cross Examination

By Mr. Preston:

Q. Mr. Jones, you have assumed that the use that is now being made of this property is the highest use that it is susceptible of, have you not?

A. No, I have not, Judge Preston. I concede that the property might be put to other uses were the regulations changed and the area cleaned up.

Q. Didn't you testify in the other case, the Della Brown case, that you thought that the property was now being put to its highest use?

A. Under the circumstances that surround it, I did; yes, sir. And I conceive that any property might change its use where the important factors

(Testimony of Donald C. Jones.)

and regulations change. Perhaps I misunderstood you.

Q. You think that this property is being used for its highest and best use?

A. I think that it is with the circumstances that surround it at the time of the valuation, yes, Judge Preston.

The Court: By that you mean as long as it is kept Indian-held land?

The Witness: Not necessarily. If it were owned by white people, it would still be governed by the same factors which govern it now, these 2-acre tracts. [60]

The Court: You mean the surrounding structures?

The Witness: Yes, sir.

Q. (By Mr. Preston): Isn't it your opinion if this were improved it would be of less value than it is now?

A. If these 2-acre tracts, with residences, yes, sir; they would not bring the income for that money.

Q. In other words, you state that the property as now being used is the basis upon which you made your valuation?

A. Yes. I valued the property as I found it, Judge Preston. Yes, sir.

Q. You realize, do you not, that the trust patents will expire, these limitations, on the 9th day of May, 1952?

A. I assumed the assumptions which were made

(Testimony of Donald C. Jones.)

in the hypothetical question, in which I assumed that the President would renew that trust patent for another 25 years, or the buyer might assume so.

Q. You have assumed that the President would in all probability extend the trust patents?

A. Yes, I have to assume the factors in my hypothetical question.

Q. Just answer my question. You assumed that they would be extended?

A. I assumed that the buyer would so consider it. [61]

Q. You have assumed that the Government would not consent to a sale of the property, too, haven't you?

A. I have assumed that the trust patent has to be sold, the trust patent has to be——

Q. Answer my question. Have you assumed that the Government would not consent to a sale of the property and free it from the trust patent?

A. In valuing the trust patent, I am assuming that, yes, sir.

Q. That is what you mean you are valuing now. You have assumed, also, that they would not consent to a lease to that property, have you not?

A. No, sir. I am assuming that the property could be leased.

Q. Have you assumed that it was the duty of the guardian of these Indians to act in good faith toward them, or bad faith?

A. I have made no assumptions regarding the

(Testimony of Donald C. Jones.)

guardian of the Indian in answering this question.

At least I can't recall any——

Mr. Preston: I can't hear you.

The Court: You assumed the conditions stated in the hypothetical question?

The Witness: I have, sir; yes, sir. I have read it very thoroughly. [62]

Mr. Preston: All right. That is all.

Mr. Brett: I want just one question, since Judge Preston asked him for his reasons.

Redirect Examination

By Mr. Brett:

Q. What is your reason for your statement that it is your opinion, considering the present environment, that the property is having its highest and best use for the purpose of lease at present?

A. The property as now environed, your Honor, a possible income on each acre from 12 shacks, which is quite substantial. If it were put to its use for residential property under the zone regulations of Palm Springs, it might have four homes on it which would not rent for anywhere near the income that the 12 dilapidated shacks do.

Q. (By Mr. Preston): You based your opinion on what it was being used for now, as distinguished——

A. Yes, sir. I have based my opinion of that property as I found it and the factors environing it which a prudent buyer would consider.

(Testimony of Donald C. Jones.)

The Court: Mr. Ennis?

Mr. Ennis: Have I a right to ask one question, your Honor?

The Court: You have a right to ask all the questions [63] you like.

Q. (By Mr. Ennis): Mr. Jones, assuming that the zoning ordinance is changed or varied so that you could put more than four residences on it, you could put a store, you could put an office building, you could put a bank, you could put a shop, would the value then for the parcels be different?

Mr. Brett: Your Honor, I have to object to that. That all turns really upon the Geiger case, 210 Pac. 2d 717. These values have to be fixed in the light of conditions as they exist, and not on the theory there will be a change and then valuing them as they would be if so changed.

The Court: Would not that objection limit you to the assumption that the trust patent would expire in 1952?

Mr. Brett: No, your Honor, because——

The Court: Because that is a condition as it is today.

Mr. Brett: I understood the question to include zoning regulations.

The Court: Yes. But it is predicated upon the assumption implicit in the question that the authorities that be could be induced or might be induced to change the zoning regulations.

Mr. Brett: That is correct.

(Testimony of Donald C. Jones.)

The Court: Just as your question is based upon the assumption that the President could elect to renew the trust [64] patents.

Mr. Brett: If the Court please, the question that counsel put to Mr. Jones to which I am objecting is this: If certain things had occurred and taken place, would it not be your opinion that the property would have a different value? That is what he said.

The Court: That is not my understanding of the question. I may not have heard it properly.

Mr. Brett: May I have it read, then?

The Court: I understood the substance of the question was to ask the witness to assume that it could be used for certain purposes, and under those circumstances would the opinion be different. Does that state the question?

Mr. Ennis: That was the question I put, or the meaning of it. The question I put, your Honor, and he answered, was it would be less valuable if he had it improved.

The Court: Well, for residential purposes.

Mr. Ennis: No; any and all kinds of purposes.

The Court: Do you understand the question?

The Witness: Yes, I believe I do, your Honor.

The Court: You may answer.

A. Assuming that the property changed in the entire environment of the property, such as you describe, and it became a commercial district, of course, the property [65] would have a higher value for such use. It is not conceivable, in my opinion,

(Testimony of Donald C. Jones.)

may I say, your Honor, that any prudent buyer would consider that such a thing would occur on this particular property which is a quarter of a mile from the business center of Palm Springs.

The Court: Anything further?

Mr. Ennis: I have no further questions.

The Court: Any further questions by anyone from Mr. Jones?

You may step down, Mr. Jones.

Mr. Brett: That concludes the testimony. But, your Honor,—

The Court: Does the United States rest?

Mr. Brett: Of course, I will have to abide by what your Honor wants, but, your Honor, I believe I can point out things, since I am somewhat curtailed—

The Court: I am referring to the testimony now.

Mr. Brett: No. As far as the testimony, I will submit it, yes.

The Court: I am speaking of the evidence now. Does the Government rest?

Mr. Brett: Yes, your Honor.

The Court: Do all parties rest?

Mr. Preston: Yes.

Mr. Ennis: Yes, your Honor. [66]

The Court: The evidence is closed, then, as I understand it.

Mr. Brett: That is correct. We rest. [67]

Los Angeles, California,

Friday, February 16, 1951, 10:00 a.m.

(Case called by the clerk for argument.)

(Brief discussion of court and counsel omitted from transcript.)

Mr. Clark: Your Honor, might I just ask a question? I have prepared a map here which shows, outlined in green, the land involved in this instant proceeding and in red the land that was involved in the proceeding before Judge Cavanah. Would it not be of some assistance to the court to have this visual picture of the location of the lands and their relation to streets and other lands before you?

The Court: Yes. If there is no objection, I will receive it into evidence.

Mr. Brett: It so happens, your Honor, that the exhibit has many other things on it. This is merely a matter of court proceeding, and it is to be understood it is being offered only for the purpose of showing the streets, alleys and other public ways, and the location of the property that is involved in this proceeding and those which were involved in the Della Brown or Eleuteria Brown Arenas proceeding. I have no objection if it is offered, however, as the other material.

The Court: Before you go ahead, let us ascertain whether that is the purpose. [69]

Mr. Clark: That is the only purpose, your Honor. It was the only map we had.

The Court: Then, if Mr. Brett has no objection

to raise, I will receive the document into evidence.

Mr. Clark: That is right.

The Court: It will be Petitioners' next exhibit.

Mr. Ennis: I have no objection to it, your Honor, excepting I think the outlining is blue here for the land, and not green as Mr. Clark said.

Mr. Clark: My wife has told me for 43 years I am color blind, and I accept it.

The Court: Very well.

Mr. Preston: I agree that I cannot tell blue from green.

The Court: Very well. Mr. Ennis, I take it you will not stand on that objection.

Mr. Ennis: No. I think it will be of assistance. It does show the relationship.

The Court: Let it be marked Exhibit S. The last one, Exhibit R, was a hypothetical question. Of course, those are the Government's numbers but it won't be any material consideration whose exhibit it is.

(Further discussion and argument omitted from transcript.)

[Endorsed]: Filed Aug. 7, 1951. [70]

[Title of District Court and Cause.]

Los Angeles, California,

Monday, May 7, 1951, 10:00 a.m.

(Case called by the clerk for hearing motion of defendant for a new trial and to amend findings and judgment, on question of attorneys' fees.)

The Court: I have gone over these motion papers, Mr. Brett.

Mr. Brett: Your Honor, there is one authority. I don't know that it particularly adds anything, but that I had not discovered before, which I would like to read. It is very short. It is a decision of Mr. Justice Holmes in *McGovern v. New York*.

The Court: Would you give the citation?

Mr. Brett: Yes, sir. It is 57 Law Ed. 1228-1232.

The Court: Do you have the official U. S. citation?

Mr. Brett: 1228-1232. I asked the young lady to put down the U. S., but unfortunately she did not do so. I will have to supply that.

The Court: 57 Law Edition what?

Mr. Brett: 1228, *McGovern v. New York*. (229 U.S. 363 (1912)). The paragraph I have in mind is very short.

"The plaintiff in error was entitled to be paid only for what was taken from him as the titles stood, and could not add to the value by the hypothetical possibility of a change unless that possibility was [2] considerable enough to be a practical consideration and actually to influence prices."

Now, I do not want to take any time. Your Honor has read the papers. I would like to point out just this, your Honor, and then I will conclude it.

We recognize that the court in this case has given very careful consideration to this matter. I so reported it. I cannot conceive any more careful consideration than your Honor has given.

We recognize the broad scope of discretion that is

vested in the court. We recognize, too, that fixing the market value as a basis, first, for fixing attorneys' fees is very illusory, but nevertheless we feel that you must have certain limits. In other words, we believe the word "informed" should have the same importance as a guess; that it can't be just a guess.

As I pointed out in the memorandum, all the attorneys predicated their values, of course, upon the theory that it would vary to some extent, depending upon what was recovered for the client, and they even failed to point out to the court what it was. I believe also that in the broad experience that this court had before he came on the bench, and some reasonably broad experience that I have had, that it is proper to say that where an opinion is expressed as to value, in which practically every element that is considered, if standing alone, would be improper, and in which, at best, it appears that the witness is [3] quite cloudy as to the final predicate upon which he expresses an opinion—and there I refer to the fact that Mr. Gallagher refers in his opinion to the so-called true value, market value, and use value, and value to the owner, and various other things I won't take time for—that there we have a situation where, at least in my experience, the average businessman either would not rely upon such opinion or he would use very great caution.

I do not expect your Honor to set aside the figures because, although I do that in the motion and I feel that it is justified in doing so, but nevertheless, as I say, I know that this case has been before you

a long time. We know that you have done everything you could with what we gave you, and therefore we can't see any basis of criticism—at least I can't—but we do feel that under those peculiar circumstances, where in effect your Honor had to take a pretty broad guess—not too much to work on—even though it may be true that we did wrong—and I can't, of course, say whether we did or not—in getting an appeal which got this remanded, instead of taking what you originally determined, we feel that this would be an appropriate case where you could do two things.

One, fixing it, since you have to, in money, but, at the same time give some protection so if, perchance, your guess was in error, there would be something left to this Indian man. I have the practical concept in mind that this [4] is going to be a judicial sale, if it has to be a sale. I still fervently hope that there will be something worked out, but the last word I had when I was in Washington two weeks ago, that unless Congress will pass a special bill, they just can't find any way it can be paid.

So if we have a judicial sale, we do not have this matter we would have with someone outside who stands on a par with the average citizen. If I had that property and I had the judgment against it, assuming it to be anything near the value the court feels it has, I could go out and arrange financing. I would not allow the property to be sold. But the Indian cannot do that, except in this one manner to which the door has been opened. The property cannot be encumbered; it cannot be sold. He cannot

make any engagement of any kind. The result is that he stands in this relatively hopeless position unless the Government can help him out, and insofar as I can find, we cannot help him out. The judgment creditor can bid up to the amount of his judgment without paying it in money. Anyone who is going to bid otherwise has to put up cash and, as your Honor knows, there is a considerable resistance to putting up cash. So there is a strong possibility, in our thought, if a judicial sale takes place, that instead of reaching the minimum your Honor has in mind, because it is a judicial sale as distinguished from a market sale, that the result would be very considerably less. It could be no more [5] than would be paid any judgment creditor, but we feel it may possibly be something.

The thing we feel is this: Under those circumstances and within the court's broad powers as chancellor to fix the sale up to \$90,000, they should get that. That has been your view and, as I say, under the circumstances we see no way to attack it, but also fix it that if the amount won't bring that—if, for instance, on the judicial sale and at the time it is made it won't come to anything like that—fix a percentage of what it will bring, and even set the same percentage that you originally set. I think that is in your discretion. If you feel, in aid of this, that you want to raise the percentage because of that factor, that is within your discretion. In other words, we simply selected that because that seemed to be your predicate on which you made the \$90,000.

The Court: Let us hear the other side.

Mr. Brett: Yes, sir.

The Court: I am only interested in this suggestion, Judge Preston.

Mr. Preston: Your Honor, my client is present and I have to say a few words that I would not ordinarily say if he were not present, I being the client.

The Court: Yes, sir.

Mr. Preston: May it please the court, the question of value in this matter is material only as a justification or [6] the lack of justification for the amount of attorneys' fees fixed by the court. You were directed to find the value, but whether you are right or wrong on that issue is not material so long as the value is sufficient to justify the figures you gave as the reasonable amount of the attorneys' fees.

The attorneys' fees were fixed by you upon the basis of four witnesses and a concession by the attorneys for the Indian, Lee Arenas.

Mr. Beckley, whose testimony is not questioned, fixed it as a million; Mr. Gallagher, the same; the two Government witnesses, about a quarter of a million each; and Mr. Ennis, on behalf of Lee Arenas, suggested \$400,000 or \$450,000.

The court took 40 per cent of our figures and upped the figures of the two experts and came practically to the same conclusion as that conceded by the attorneys for the Indian.

You had the perfect power, your Honor, to accept such portion of the testimony as you saw fit. You could take the testimony of these two experts

of the Government and up it to \$400,000 from \$250,000 if you saw fit and the facts warranted it. You could take the larger figure and reduce it, as apparently you did, to about 40 per cent.

So there is nothing wrong with the figures here. There is no error that is of any importance on appeal here, if you were in error. And I say you have exercised your discretion; you have weighed the evidence; you have made the judgment, and [7] it is absolutely faultless, in my opinion.

The court wants to know whether or not I am interested in a limitation of the judgment to be 27 per cent of the cash value of the property.

The Court: The motion is $22\frac{1}{2}$ per cent.

Mr. Preston: $22\frac{1}{2}$ per cent, yes, $22\frac{1}{2}$ per cent of the cash value of the property.

It is not the disposition of counsel, of whom I am one, to in anywise take advantage of Lee Arenas. On the contrary, we are in a position to co-operate with Lee Arenas. The only thing in this case that is bothering me at all is the United States Government and its narrow, constricted view of what it ought to do.

The time for the period of redemption, of the extension of the period, unless it is extended—the period where fee simple titles will result—is in 1952. If the Government of the United States would now, as it can do, lift that restriction, we would fix this matter up with the Arenas in three days or less. There isn't any trouble about it at all and there isn't any reason for this court to be concerned about

whether the Indian will be mistreated or not in the case of a judicial sale.

The sale will be free from its restrictions, as I understand it, and when so free from restrictions, the purchaser will get a title free from restrictions. And I will bet you [8] there are 25 or a dozen, at least, bidders would be there to see that this property brought its full value. I have people coming, I know, even wanting to know when they can get a chance to try to buy some of this property.

There isn't any controversy here at all and there is no crisis, your Honor whatsoever. The Government is narrow in its conception of what its duty is in this case. It has been narrow all the time. Mr. Brett is being directed from a narrow space in the Department of Justice—and having been connected with it 12 years in my lifetime, I know just what he is up against. And there isn't any way in the world that I can see that you can do this, but my own opinion is it will never come to that point at all.

The Court: Would the petitioners here be prejudiced if, for example, they were limited by the judgment to a maximum recovery of \$90,000, limited to 25 per cent of the proceeds of the property?

Mr. Preston: Well, your Honor, you limited it to 22½ per cent before and the Government appealed. Now they are coming in here and wanting you to put that limit on it again. It is childish, in my opinion.

The Court: I am not considering it from the point of view of the Government's reaction.

Mr. Preston: I know you are not.

The Court: But from the point of view, without repeating [9] all of the considerations that we have discussed heretofore, I was attempting to think and have been attempting to think of some prejudice that might come to the petitioners. I am assuming, of course, your confidence in the values which have been found, that those are values which, upon the sale, will have pragmatic sanction.

Mr. Preston: Did I understand you to suggest 25 per cent?

The Court: Yes, I was suggesting that. I am thinking not only of the substance of the thing but the principle of the matter.

Mr. Preston: This property will not be put up as a whole.

The Court: Yes, I have that in mind. Of course, you would be prejudiced to this extent: You could not bid your amount against one parcel; you could only bid up to 25 per cent of your amount.

Mr. Preston: I do not think that is fair to us. I think we have done our duty, your Honor. We have done it faithfully. We have waited vainly. I am putting up money for a share in it now, and the money already in it, and the Indians or the Government is stepping in their shoes, and I do not think the Indians would care one way or the other about what you do about this.

The Court: I am only thinking of the possibility that the values might not be translatable into money, even though the values are sound as of a given time.

Mr. Preston: How would you word the judgment

when we have got to offer it in pieces? You would have to specify the limit.

The Court: You would have 25 per cent of the proceeds.

Mr. Preston: You would have to put a limit on each piece.

The Court: You would have 25 per cent of the proceeds. And I suppose, as a practical matter, we would have to provide for you to bid up to 25 per cent against——

Mr. Brett: May I speak, your Honor?

The Court: Yes.

Mr. Brett: It seems to me there would not be any reason why—I am just thinking this up—assuming there would be just one part, let us say, the two acres, if there was a counter bid there for \$80,000, I see no reason why they could not bid on it \$90,000.

Mr. Preston: If you would consent for us, we would take 22½ per cent of the land and be glad to do it.

Mr. Brett: That I can't do. It is not that I do not want to.

The Court: But here, Mr. Brett, suppose there is one parcel offered.

Mr. Brett: Yes, sir.

The Court: Can your judgment necessarily provide that, as to that parcel, the petitioners here could only take 25 per cent, or whatever the present percentage, of the proceeds [11] of the sale of that parcel? Otherwise the heart of the watermelon might be put up the first time and that would be the thing that would bring, say, \$90,000 of a money

judgment to the creditor, and the remaining parcels might not be worth \$2,500.

Mr. Preston: It is impractical.

Mr. Brett: Thinking in the abstract, I would say, "Yes, that is true." However, I believe, your Honor, that we would feel that at least we had done the best we could for the Indian if we had saved some, even though it was not the heart. I would not stand for the point that we would have to restrict the bid on any particular parcel to bid up to a percentage. In other words, all we would feel is this: That the total amount would be not over \$90,000, but if the bids were such that, for instance, a piece was coming up for about \$25,000 or \$30,000 or something like that, which is in line with our evidence, that then they would only get a percentage of that. In other words, we want to save some land for the Indian.

Your Honor, I would like to say this one thing. I do not like to go into matters outside of court, but part of what Judge Preston said is not entirely clear. I was in Washington less than 10 days ago and talked with Mr. W. H. Flannery, Assistant Solicitor. He told me he had not had the opportunity to have Judge Preston's views on it, but had said that the Government would join with Mr. Clark, if he and his associates would present a bill to Congress, and Mr. Clark said they [12] would not object to that.

Mr. Preston: I never heard of that before and I would not pay any attention to it if I had.

Mr. Brett: I think I could make the statement

under oath. I asked Mr. Clark could I make that representation to the court. He said they had young fellows in his office and they were ready to draw a special bill. Mr. Clark objected. So I just say that from the implication——

Mr. Preston: I talked to Mr. Flannery. He told me that they could not afford to let the Indians' land sell.

Mr. Brett: That was before this last judgment, your Honor.

Mr. Preston: Could not afford it, and the judgment is good. Why, it is ridiculous for the Government to sit around and allow this Indian's land for sale. It is perfectly ridiculous. It is a reflection on the whole department. There is a bad enough odor around it now, and this is certainly a perfectly black eye.

Mr. Brett: I want it understood I think of its impracticalness, but I have been permitted to state to the court if any counsel who are interested on the other side here would agree with the Government or the Department of the Interior, that the Department of the Interior is prepared now to present to Congress a special bill for the payment of this judgment.

Mr. Preston: We have no objection to bills, but we are [13] not going to wait for Congress to give us a bill. We have our lien and we are going to hold on with it.

The Court: I do not see how, Mr. Brett, under the mandate here and the opinion of the court, over the objection of the petitioners I could reimpose this

percentage limitation. Unless all parties agreed to it, I fear if there were an appeal the Court of Appeals might construe that as in the nature of a disregard of the mandate.

Mr. Brett: Well, your Honor—

The Court: I still adhere to the view, as you gentlemen know, that the fair and equitable way to do this is to give the petitioners a share of the recovery in kind, so that we know what we are adjudicating, what we are awarding.

Mr. Preston: And the Government could consent to the Indian doing that. They have got all the cards, the ace in the hole, everything else, and all they have to do is to consent to the Indian raising the money to pay us or consent for the Indian to give us a piece of the land, either of which we are entitled to.

Mr. Brett: Mr. Ennis is here and I know he will bear me out. There was a discussion not so long ago in the corridor there of the possibility of my getting the authority in this particular case of merely releasing the restriction would Lee Arenas immediately oppose that. We have to treat this, of course, not on an isolated basis. We can treat the [14] matter of a judgment on an isolated basis, but on the question of whether we are going to release matters of that kind we would immediately have a group in Congress then, raising “Ned”—that is using the vernacular—because we are cheating the Indians out there. I am satisfied they do not want to have free patents for the reason they benefit by having trust patents.

If your Honor feels you cannot do it, we have made the motion, that is all. Maybe the Court of Appeals could if we ask, and maybe they cannot. I do not know.

The Court: Over the Petitioners' objections, I fear it may be construed that I was running counter to the mandate; that I was superimposing my own views over the view of the Court of Appeals. The Court of Appeals has said in effect that this cannot be done properly.

Mr. Brett: Would your Honor have any objection to putting that in your Honor's ruling, that you are overruling that motion to amend upon the ground you feel under the mandate you cannot do so? So if we desire, we can have that phase of it reviewed.

The Court: I am putting it in the order denying it. I feel that the Court of Appeals is wrong in this matter, and that is in the record. The Superior Court does it over here every day, probably many times a day. What the opinion says is impractical and can't be done. Take personal injury cases [15] where minors are involved. Who knows the value of that minor's person injury case? A lawyer goes in there with a petition and says: I am employed by the guardian ad litem to prosecute this personal injury case on behalf of the minor. I have agreed to take 25 per cent of the recovery, whatever it may be. I ask the court to approve that contract as fair and reasonable, and the Superior Court has no trouble apparently doing that all the time.

That is what we attempted to do here. We said:

We do not know what the value of this land is. Without knowing, we will estimate in terms of percentage, instead of terms of dollars, the reasonable value of an attorney's share of whatever may be recovered. And that is what, as I view it, the State court does every day in these minor cases.

Mr. Brett: Your Honor, I think the distinction there, if you will permit the comment, is that ultimately and before the attorney's fee can be fixed, that is, before he has any questions about whether he can enforce it, the total judgment has to be fixed in money. But under the judgment which your Honor rendered there was no way in the world that we could fix that in money to pay up the lien; there was no way to determine it.

The Court: But the personal services in those cases, Mr. Brett, have not only been evaluated in percentage, instead of dollars, but have been evaluated in advance of the rendition, [16] so they have had two hypothetical remedies in those cases.

Mr. Brett: That is true, but the attorney could not collect anything until it has become determined.

The Court: I know, but the court has adjudicated the recovery.

Mr. Brett: Your Honor, I do not understand that we would have had any objection to the percentage if it had not been in the final form of judgment. In other words, we really felt on the adjudication of the first case that we could never erase the lien except by sale, the only settlement would be to sell the property. There was not another way it could have been done. If your Honor had fixed it in

a percentage, and you then also determined that you were going to fix the amount of the value of the property in money, that might have been a different situation. But we had no way to raise that lien. There is no way that we could have gotten determined what the amount is. That in effect is what we are trying to do now. I think it should have been done before, and in that respect Judge Preston is right and I am not critical. It is part of the Government work and we would help with that work within certain circumscribed matters. Otherwise we would have various parts of the country and various counsel going at it various ways.

The Court: It may very well be that the method you suggest would have been permitted. I cannot say, of course. Perhaps [17] you have to have the value of the entire property.

Mr. Brett: That was the phase we had in mind. We just could not figure what way we would have to pay, because we would have to sell the property.

The Court: The same way with these personal injury cases.

Mr. Brett: That is true, but it does not fix itself. In other words, there is nothing the attorney can enforce until he gets a judgment.

The Court: I see your point, that there is no way that could be paid off from other sources, the claim for attorneys' fees. After the judgment is reduced to dollars and cents you could lift the lien.

Mr. Brett: That is right.

The Court: Whereas here, there is no way in

the world to lift that lien until the property was sold, and then it would be too late.

Mr. Brett: Yes, sir. As I understand it then, your Honor, whoever draws the order—and you have not designated who the party will be to draft the order—that you are denying this alternative motion upon the ground that you feel under the mandate you have no authority to do so.

Mr. Preston: I do not see why you should restrict your ruling.

The Court: Over the objection of the moving parties. [18]

Mr. Brett: Yes.

The Court: You may say that.

Mr. Brett: Shall I draw such an order?

The Court: You may prepare an order denying the motion for new trial, without more.

Mr. Brett: I understand. Yes, sir.

The Court: And a further order denying the motion to amend upon the grounds stated.

Mr. Brett: Do you want Judge Preston or me to draw it?

Mr. Preston: You had better draw it.

Mr. Brett: I will draw it.

The Court: And settle it under Local Rule 7.

Mr. Preston: I will object to it then.

[Endorsed]: Filed Aug. 7, 1951. [19]

PETITIONERS' EXHIBIT No. 1

Received Jan. 9, 1941. Mission Agency, Carl Spinner,
Principal Clerk in Charge.

Copy

January 2, 1941

Mr. John W. Dady, Superintendent
Mission Indian Agency
Riverside, California

In re: Lee Arenas

Dear Mr. Dady:

The undersigned hands you herewith an Agreement made and entered into the 20th day of November, 1940, by and between Lee Arenas, a duly enrolled member of the Tribe of Indians known as the Agua Caliente (Palm Springs) Band of Mission Indians of California, Party of the First Part, and David D. Sallee, attorney at law, residing at Los Angeles, California, Party of the Second Part, and which contract has been duly and regularly approved by the Federal Court, on the 20th day of November, 1940, and certified to by the Clerk of the United States District Court under said date.

This contract covers services to be rendered in the case of Lee Arenas against the United States of America, No. 1321-RJ Civil in the District Court of the United States for the Southern District of California.

In accordance with the rules and regulations of the Department of the Interior, will you kindly have said Contract duly and regularly approved by the Department of the Interior, office of the Indian

Affairs, and also by Department of the Interior, Office of the Secretary.

Thanking you for your courtesies in this matter, I remain, yours truly,

DAVID D. SALLEE

DDS:LB

Admitted in evidence 2/10/48.

PETITIONERS' EXHIBIT No. 2

Copy

November 11, 1942

Mr. John W. Dady,
Superintendent Mission Indian Agency
Riverside, California

Dear Mr. Dady:

Quite sometime ago I handed you certain contracts of employment executed by Lee Arenas and approved by Judge McCormick of the United States District Court here in Los Angeles. I took your receipt for same and you informed me that you would forward said contracts to the different channels and have same approved and returned to me. That has not been done. Will you advise me to whom you forwarded those contracts as I want to have that matter completely complete as I am putting the Interior Department and the Indian Department herein notice through this letter that I do not intend to have them come up and question my right to appear in any court regarding this litigation.

Thanking you for your information and awaiting your immediate reply, I remain,

Yours truly,

DAVID D. SALLEE

DDS/ek

Admitted in evidence 2/10/48.

PETITIONERS' EXHIBIT No. 3

Copy

November 16, 1942

Department of the Interior

Indian Office, Washington, D. C.

Re: Lee Arenas vs. U. S. of America

Dear Sir:

On January 10, 1942, there was forwarded to your office by John W. Dady, Superintendent, Mission Indian Agency, in Riverside, California, four copies of a contract entered into by and between Lee Arenas and the undersigned acting as attorney for Lee Arenas. The aforementioned contracts were duly and regularly executed and duly and regularly approved and ratified by Federal Judge Paul McCormick of the United States District Court at Los Angeles and said contracts were further certified to by the United States Clerk's office all according to the rules and regulations provided. To date not one word has been received from any of the different agencies regarding the receipt of the aforementioned contracts which were forwarded to your office for its approval in accordance

with the rules and regulations and only recently have I been able to ascertain what disposition was made of those contracts, and as to final disposition, I have not been informed.

Therefore, will you kindly have same approved and returned to me forthwith as I am putting the Department on notice that they will be estopped to raise a question at any proceeding in the present litigation that I am not a duly and authorized attorney for said Lee Arenas.

Awaiting your immediate reply and thanking you in advance for attention to this matter, I remain, your truly,

DAVID D. SALLEE

DDS/ek

Admitted in evidence 2/10/48.

PETITIONERS' EXHIBIT No. 4

In the District Court of the United States in and
for the Southern District of California,
Central Division

No. 1321—O'C—Civil

LEE ARENAS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

INTERROGATIONS

Pursuant to a Stipulation dated January 28, 1948, entered into between petitioners John W. Preston,

Petitioners' Exhibit No. 4—(Continued)

Oliver O. Clark, and David D. Sallee, and respondent United States of America, and Lee Arenas (by United States of America), the following testimony was taken at a conference held in the law offices of John W. Preston, Esq., 712 Rowan Building, Los Angeles, California, on January 28, 1948, at two o'clock p.m., in connection with the above entitled action.

Those present and participating in the conference were: Messrs. John W. Preston, Oliver O. Clark, David D. Sallee, and Irl D. Brett.

Mr. Brett made the following interrogation of Mr. David D. Sallee:

(Judge Preston handed Mr. Brett, in the presence of Messrs. Oliver O. Clark and David D. Sallee, a document entitled "Statement of Facts" in reference to the services performed by them, and each of them, in the case of Lee Arenas vs. United States.)

Q. As I understand it, Mr. Sallee, the Statement of Facts, which has just been handed to me, consisting of eight pages and reciting certain facts respecting your activities as set forth in the Petition upon which the Order to Show Cause is based, may be deemed, for the purpose of the Stipulation, a statement of facts as you would testify to them in connection with what you did as attorney for Lee Arenas in this case? A. Yes.

Q. You have shown me the original of a document which bears the date of November 20, 1940, which recites that it is an agreement between Lee

Petitioners' Exhibit No. 4—(Continued)

Arenas and David D. Sallee. Now, was that document executed in more than one original?

A. Yes; two.

Q. Were both signed and acknowledged in the form in which you have submitted a copy to me?

A. Yes.

Q. Were you present, Mr. Sallee, when Lee Arenas affixed his signature to that document—when he signed both originals?

A. Yes, in the court room of Judge McCormick, before Judge Paul J. McCormick.

Q. Lee Arenas was there?

A. Yes, and on the stand for about two hours.

Q. Was there any transcription of his statements or testimony at that time? A. I doubt it.

Q. Who were present besides Judge McCormick and Lee Arenas and yourself?

A. A man by the name of Collett, who is in Washington at the present time. There were two or three Indians too, I think, but it has been so long ago I can't remember exactly. Eugene Graves was in the court room that afternoon.

Q. Were the clerk and bailiff there?

A. Yes.

Q. How did the proceeding originate, how did you get before Judge McCormick?

A. I don't remember whether the clerk took it in there or whether he let me go in there to see Judge McCormick personally and ask him to make an ex parte matter of it. It was over seven years ago and those details are gone now.

Q. Was any member of Lee Arenas' family present besides himself?

Petitioners' Exhibit No. 4—(Continued)

A. I don't know whether he was married to his present wife at that time or not, I don't think so, but if they were married, she was there. If they were not married, there was no other person there.

Q. It is not contended that there was any legal proceeding then pending in the District Court to which Lee Arenas was a party?

A. No, the suit hadn't been filed. The suit was filed December 20th, and this was November 20th.

Q. My question is this, Mr. Sallee: There was no proceeding in the District Court at Los Angeles that was pending at the time of this hearing before Judge McCormick in which Lee Arenas was a party?

A. This proceeding was had under the procedure of the rules and regulations of the Interior Department and the Indian Department to have a contract validated before a local Judge.

Q. Was it required to comply with Section 2103 of the Revised Statutes?

A. I would have to read it.

Q. I was referring to the one mentioned in the contract.

A. I expect it is, yes.

Q. Before this meeting in Judge McCormick's court room, had you had any conversation with Lee Arenas about the making of this agreement?

A. Yes.

Q. And where did you have this conversation?

A. The first one was in the office, in my office in the Garfield Building, the day he came in and

Petitioners' Exhibit No. 4—(Continued)

asked me to check his case for him, that was the first time I had met him.

Q. Can you fix it with reference to this date, not necessarily the exact date?

A. Just a short time—probably six weeks or thirty days, I can't tell you, I don't just remember.

Q. And at that conference who were present?

A. Just him and myself at the first conference, the second I called Mr. Clark and he came downstairs to my office. We had the same reception room at that time and I buzzed him and he came in.

Q. This second conference was before you went to Judge McCormick with the agreement?

A. Yes. I want to correct what I just said that Mr. Clark was in the same office with me then. I had just moved down into my new quarters a short time, and he came downstairs, that's right.

Q. At this second conference who were present, Mr. Lee Arenas, Mr. Oliver, and yourself?

A. Yes.

Q. Was the conference extended or short?

A. Short.

Q. Would you mind summarizing the gist of the conference?

A. The gist was we would have to get into agreement for a written contract so that we could have the authority to go ahead and represent him, he saying at all times he didn't have money to pay lawyers, that we would have to look to the property to get our pay.

Q. You would have authority—what do you

Petitioners' Exhibit No. 4—(Continued)

mean? Was any mention made in that conversation about regulations of the Government?

A. Presume there was, I couldn't remember that detail now.

Q. You don't remember what representation or mention was made? A. Not specifically.

Q. You were there approximately two hours before Judge McCormick? A. Practically.

Q. Was there a reporter present?

A. I can't remember.

Q. Was there a clerk present? A. Yes.

Q. At the close or conclusion of that session were any documents signed by Mr. Arenas or by you? Or by Judge McCormick? I mean, other than the document consisting of twelve pages, and a copy of which has been furnished to the Government?

A. None other—that is, outside of what the Court might have—these two copies were signed in the court room. Lee Arenas signed, I signed, and then Judge McCormick signed, and I think Mr. Zimmerman signed them.

Q. That is the document that makes up these twelve pages? A. Yes.

Q. Your testimony is, however, that other than those twelve pages, nothing else was signed by either you or Mr. Arenas or the Court that you recall?

A. Not at that time.

Q. Who prepared the document called the "agreement"?

A. I prepared the rough outline, then Oliver

Petitioners' Exhibit No. 4—(Continued)

Clark and I went over it together, and he detailed it, and it was probably edited three or four times before its final form.

Q. Was it ultimately drafted in your office and under your supervision? A. Yes.

Q. Was it discussed with Mr. Arenas before you went with it to Judge McCormick? A. Yes.

Q. Where?

A. I don't remember. The first conference was out at his home under a tree, with Mr. Clark and me. We called on him, or in my office, I don't just remember, we had two or three conferences over the matter. Mr. Clark was in on a couple or three of them, and a couple of them I went over the outline with him myself, explaining it in detail.

Q. Was Mr. Clark present when these conversations took place?

A. Two or three of them, yes.

Q. With reference to the provision that appears on the first page, lines 11 to 16, and which recites that the first party—that would be Mr. Arenas—"hereby contracts with, retains, and employs the party of the second part as attorney in the matters hereinafter mentioned, subject to the approval of the Commissioner of Indian Affairs, and the Secretary of the Interior, pursuant to Section 2103 of the Revised Statutes of the United States of America", what did you state to or explain to Mr. Arenas?

A. I can't give you the details, but the sum and substance was that if I was to do his work I wanted

Petitioners' Exhibit No. 4—(Continued)

a contract executed by him and approved by the Court, whereby fees could be obtained later on if and when litigation turned favorable to him, that's the gist of it.

Q. Did you or did you not tell him that the agreement would not be effective until it was approved by the Commissioner of Indian Affairs or until it was approved by the Secretary of the Interior?

A. I told him I would send the contract in to be approved, which I did after the Court had approved it here.

Q. Yes, Mr. Sallee, but did you tell him that it would not become effective until approved by the Commissioner of Indian Affairs or the Secretary of the Interior?

A. I didn't tell him, because in my opinion it was effective all the way through.

Q. Is it your recollection that, at the hearing before Judge McCormick, that particular clause was referred to either in interrogating Mr. Arenas or in speaking to the Court, or making representations to the Court, or answers to questions of the Court?

A. I didn't go into details of the contract, but Judge McCormick took the contract and read it paragraph by paragraph and interrogated Mr. Arenas himself.

Q. Mr. Clark was not present?

A. No, he was in a trial and couldn't be there.

Petitioners' Exhibit No. 4—(Continued)

Q. And Judge Preston wasn't associated in the case then? A. No.

Q. Was there any reason why you were the only one who was named? I mean, was there any reason expressed by you or Mr. Arenas or by Mr. Clark, or anyone else, as to why you were the only party——

A. The only explanation is this: Tom Sloan and I had known each other in the past. Tom came down to ask me to be associated with him in the Ste. Marie case, that was the first time Oliver knew anything about the Indian case. Tom told the Indians out there that I was to be associated with him, and when Lee later came into the office that was the first time I met him after I had been out there interviewing the other Indians at the request of Tom Sloan. Lee Arenas said to me: "I have been wanting to meet you. Me hear lot about you. Me want you my lawyer. Me want you file my case for allotment." I said: "All right, I will do it." I don't remember whether Mr. Clark—if I called him and he came in at the first conference or not, I doubt it, but the next conference he was in on. But at the request of Mr. Clark he told me "you take that contract in your name, it would be easier for you to handle all the details here because you won't have to hunt me up for signatures, but you have the power of your associates anyway, you take the contract in your own name."

Q. Going back to the hearing before Judge McCormick—so far as your recollection serves you,

Petitioners' Exhibit No. 4—(Continued)

having in mind it has been quite a while, did Judge McCormick interrogate you or Lee with respect to the paragraph which is the second paragraph of the agreement, and which refers it to being subject to the approval of the Commissioner of Indian Affairs and the Secretary of the Interior pursuant to Section 2103 of the Revised Statutes?

A. I don't remember any specific questions at this time.

Q. Between the 20th of November, 1940 and 1st of February, 1945, were there any other writings which were executed by Mr. Lee Arenas and you, or Mr. Lee Arenas and you and Mr. Oliver O. Clark, or Lee Arenas and you and Mr. Oliver O. Clark and Judge Preston which were in the nature of agreements for employment, as distinguished from correspondence or checks or remittances or bills?

A. On February 1, 1945 the modified contract was signed.

(Judge Preston: The question is between the time——)

A. Between the time, no.

Q. I note that the duplicate original, which Judge Preston has handed me, as well as the copy which was furnished to me, discloses the affixation of a stamp of the Office of Indian Affairs on page 1 between lines 8 and 11, which reads: "Office of Indian Affairs, received January 14, 1941", and there is also impressed in heavier type the numbers 2520. So far as you know, was both that stamp and

Petitioners' Exhibit No. 4—(Continued)
number impressed by the Office of Indian Affairs?

A. So far as I know.

Q. Prior to that date was one of these documents, or more of them, mailed to any official of the United States Government?

A. On January 2, 1941, I handed to Carl Spinner, Principal Clerk in Charge, at the Riverside Agency, a letter, together with three of these copies, all executed by Lee Arenas, and all executed by Judge McCormick, and attested by the clerk, and signed by me.

Q. Do you have in your hands a copy of the communication? A. Yes.

Q. I note that this carbon copy of letter dated January 2, 1941, is addressed to Mr. John W. Dady, Superintendent, Mission Agency, Riverside, California, and said in re Lee Arenas, etc., and has a stamp mark "Received January 9, 1941, Mission Agency", with the signature of Carl Spinner, and stamped "Carl Spinner, Principal Clerk in Charge". The receipt stamp, together with Mr. Spinner's signature, was affixed in that office in your presence? A. Yes.

Q. Will you undertake to have some copies made, please, for the purpose of this matter, noted as Exhibit 1? A. Yes.

Q. Now, Mr. Sallee, between November 20, 1940 and January 9, 1941, which was the date of the receipt of the letter of January 2, 1941, which we have just marked Exhibit 1, were there any other letters or other form of writings executed by you,

Petitioners' Exhibit No. 4—(Continued)

or to your knowledge by Mr. Clark or anyone else as your associate, directed to any official of the United States Government in respect to this agreement of November 20, 1940?

A. Not that I remember right now.

Q. Did you receive any communication in writing from any representative of the United States Government in response to the letter of January 2, 1941, and with relation to the document designated "Agreement" and dated November 20, 1940?

A. Yes.

Q. Do you have that?

A. No, I would have to locate it.

Q. Without precisely fixing it, can you state approximately how long after January 9, 1941 you received the communication and from whom?

A. Probably a year or so, because I had from time to time asked Mr. Dady if he had heard anything, and he said "no", and on November 11, 1942, I addressed a letter to him, and on November 16, 1942 I sent another letter to him about it. It was some time later that—I can't say how long—that I received a letter from Washington relative to it, and I have endeavored to find that letter, but have been unable to find it to date.

Q. As I recall your statements, it would have been after November 16, 1942? A. Yes.

Q. Do you recall from whom you received the communication?

A. It was one of the officials in the Department.

Petitioners' Exhibit No. 4—(Continued)

Q. The Department of the Interior, Indian Affairs?

A. Yes, Indian Affairs I think, the department that handles contracts.

Q. Do you recall, generally, the contents of the communication?

A. Just the substance. That they had refused to accept my contract at this time, stating that this litigation was on and that if favorable, the contract was good against Lee Arenas anyway. However, as I remember, it was not an absolutely flat denial, except in substance "we can't approve it" and went on and stated that it was a one-page letter or page-and-a-half, I can't just remember exactly.

Q. You have stated that prior to your receipt of that communication, the substance of which you have just given to the best of your recollection, you had delivered or mailed to Mr. Dady two other communications. Do you have carbon copies of them?

A. Yes.

Q. Mr. Sallee, you have shown me a carbon copy of a communication dated November 11, 1942 to Mr. John W. Dady, Superintendent of the Indian Agency at Riverside, the original of which you delivered to Mr. Dady. You have also shown me a copy of a letter addressed to the Department of the Interior, Office of Indian Affairs, dated November 16, 1942, Washington, D. C., in re Lee Arenas vs. United States of America, and that communication was mailed through the United States mails to that office?

A. Yes.

Petitioners' Exhibit No. 4—(Continued)

Q. May these be annexed as exhibits, Exhibits 2 and 3 please? A. Yes.

Q. Mr. Sallee, when you received this reply that you have roughly described, did you communicate its contents to Mr. Clark? A. Yes.

Q. Did you communicate its contents to Judge Preston at any time?

A. At that time he wasn't in the case. I don't know whether I told him they had been turned down or not.

Q. I have written to the Department to see if they could dig up for me the originals or copies of certain correspondence. I am assuming that they will dig up this communication. May it be stipulated between us that if I get it in time I will submit it to Mr. Sallee, and it may then be incorporated in lieu of his oral statement after he has identified it?

A. Yes. One further statement. As I remember, in that letter, it was a letter subsequent to that, they retained one copy there for their records. They do have one of these copies there.

Q. Following the receipt of that communication and prior to the time that you received the three duplicate originals from the office of Indian Affairs—they having retained one copy as you have just stated—did you have any further written communications with the Office of Indian Affairs or with any official of the Department of the Interior or any other official of the United States Government in connection with this particular matter and the document dated November 20, 1940?

Petitioners' Exhibit No. 4—(Continued)

A. I can't answer that definitely. I did have some correspondence with one firm of lawyers in Washington relative to it. I am going through my files, getting this in chronological order so that I can give it to you.

Q. Is it the import of your last answer that you attempted to make arrangements with some local representatives in Washington, D. C., to contact one or more Government representatives in connection with this matter?

A. I started out to have someone represent me there so that I would not have to make a trip back there.

Q. You did not obtain that representative?

A. No, that's as far as it went.

Q. Did you have any oral conversation with any representative of the Government in connection with this document dated November 20, 1940, following the receipt of the communication which you have been unable to describe?

A. None other than with Mr. Dady at Riverside.

Q. Approximately when was that with reference to when the documents were returned to you—before or after?

A. Before and after both, because from time to time I would see him, and I would bring up the question.

Q. And what was the gist of the question?

A. What the dickens was the matter that they

Petitioners' Exhibit No. 4—(Continued)

wouldn't come through in a decent way with the approval of those contracts.

Q. What was Mr. Dady's reply?

A. He didn't think we had a good case, that was the sum and substance of it.

Q. Was anybody present besides yourself and Mr. Dady? A. No.

Q. At the time you received the communication, which you have roughly described but have not been able to locate and produce, did you at the same time and with that document receive back the two originals? A. The originals came back later.

Q. Briefly, my question was—when they were returned to you, were they accompanied by any written communication from the Government?

A. Yes. I think a short letter saying "we are returning herewith the two original contracts", something like that.

Q. Do you have the communication in your file?

A. I should have it. I will give it to you. I didn't have a chance to get my things together.

Q. May it be stipulated that if Mr. Sallee can locate it, that a copy may be annexed and marked Exhibit 4 to this statement?

(Mr. Preston: And also to the other communication, the contents of which he has described.)

(Mr. Clark: It is agreeable.)

Q. Mr. Sallee, when Mr. Arenas executed this document dated November 20, 1940, did he deliver to you any monies? A. No.

Q. At any time thereafter and up to the present

Petitioners' Exhibit No. 4—(Continued)

time did Mr. Arenas deliver any monies to you?

A. Different amounts from time to time, yes.

Q. Have you made a practice, Mr. Sallee, of keeping a book record of this account?

A. No.

Q. Have you any form of written form of memoranda or record of amounts which were delivered in your hands either directly by Mr. Arenas, or so far as you were informed, purported to be made by or for Mr. Arenas in connection with this particular case?

A. I am getting, as soon as I can, a statement of those amounts, going over my receipt books and paid bills.

Q. You mean you are having it transcribed?

A. No, I can give you a detailed statement of it, see what it amounts to.

Q. And are you also intending to make a detailed statement, so far as you can, of what amounts you expended from the amounts you received?

A. Yes.

Q. May it be stipulated, gentlemen, that as soon as Mr. Sallee has accomplished that result, that a copy of that statement can be annexed and marked as the next exhibit in order? A. Yes.

Q. Would you have any objection, Mr. Sallee, to making just a short written certification to the best of your recollection and information that these consist of all the amounts expended in behalf of this litigation? I don't know if you are required to do it or not, but——

Petitioners' Exhibit No. 4—(Continued)

A. I reserve that until I get it made up.

Q. If you decide that you are agreeable, may it be added to the exhibits? A. Yes.

Q. So far as you are informed, Mr. Sallee, were any monies obtained or received from Mr. Arenas directly or indirectly, and by indirectly I mean advanced or made available by someone else purporting to act in behalf of Mr. Arenas, to anyone other than yourself in connection with this particular litigation? A. That I don't know.

Q. So far as you know, was any compensation, in any form, either money or any other form, paid to any person other than yourself, up to the present time, by Mr. Arenas, directly or indirectly, aside from advances or costs and expenses which you intend to set forth in your account?

A. Not that I know of, I couldn't tell you what has been done.

Q. Have you received any monetary payment from Mr. Arenas, directly or indirectly, to be applied on account of fees as distinguished from costs and expenses? A. No.

Q. Now, have you ever, at any time, prepared an offer to furnish or submit to Mr. Arenas personally, or to anyone in his behalf, any record of your account in the way of a statement or voucher in respect to the expenses which you incurred and paid?

A. That question has never arisen at any time.

Q. It is stated in the document dated November

Petitioners' Exhibit No. 4—(Continued)

20, 1940, commencing on page 5, line 24, and ending on page 6, line 14:

“It Is Further Understood that in event the Party of the Second Part, or his associates who are actually associated in the litigation and investigation as aforesaid, shall advance any necessary expenses, they shall be reimbursed by the Party of the First Part, from the property recovered, such actual expenses as are strictly necessary or proper in connection with the printing of briefs, court costs for proceedings and other similar matters, and to include such actual and necessary traveling expenses, clerical hire, stenographic expense, and the like as may be properly required for the prosecution of said case, or cases; provided that all such expenditures shall be itemized and verified by the Party of the Second Part, and shall be accompanied by proper vouchers, and shall be only upon the approval of the Secretary of the Interior, or an officer designated by him who shall certify the same.”

Have you at any time prior to the filing of the Petition or at any time subsequent to the filing of the Petition and up to the present moment, prepared any vouchers or other writings setting forth the detail of expenditures made by you, and verified the same and submitted them for approval to the Secretary of the Interior? A. No.

Q. Or submitted them for approval to any other official that the Secretary of the Interior had designated? A. No.

Q. Have you ever requested the Secretary of the

Petitioners' Exhibit No. 4—(Continued)

Interior to designate any official? A. No.

(Mr. Preston: That would be only if you wanted to collect them.)

Q. It is provided in the same document dated November 20, 1940, Mr. Sallee, commencing on page 6, line 15, and ending on page 7, line 13, as follows:

“It Is Further Understood and Agreed by and between the parties of this Agreement, that in event of a misunderstanding as regards the manner in which the compensation to the Party of the Second Part from the Party of the First Part shall be paid; and Trust Patents or receipts have been issued, and in that event the Party of the First Part shall thereupon make application for a removal of restrictions upon sufficient of the premises to be sold, and from the proceeds of said sale or sales to pay said Party of the Second Part; that in event it is not for the best interests of the parties hereto to sell said land, the removal of restrictions shall be applied for upon properties coming to the First Party, as selected by said Second Party, upon the basis of one-tenth of the property—That is to say, Second Party shall select one property that does not exceed ten per cent of the total value of all properties, and that First Party shall select nine properties that do not exceed ninety per cent of the total value of said properties, and continue to make such selections until all property shall have been selected. That the property selected by the Second Party shall then be deeded to said Second Party,

Petitioners' Exhibit No. 4—(Continued)
subject to the approval of the Secretary of the Interior and the Commissioner of Indian Affairs."

Was that paragraph discussed between you and Mr. Arenas before he signed it? A. Yes.

Q. What did you tell Mr. Arenas?

A. I explained the wording of it, and it was also explained by Judge McCormick to Mr. Arenas.

Q. You at that time, Mr. Sallee, were somewhat well grounded in the Indian law that existed, were you not? A. Just fair.

Q. You had made examinations of the law?

A. Oh, yes.

Q. Had you not discovered that the particular property was covered by express provisions of the Congress so that the restrictions could only be moved by the Department of the Interior.

A. That's right.

Q. Did you so inform Mr. Arenas?

A. Yes.

Q. And you so informed Judge McCormick? In answer to his question?

A. I informed him, and he also made that very same statement.

Q. Has any trust patent been issued as to these lands?

(Mr. Preston: They don't have to. The law says a certified copy of a decree is a trust patent.)

Q. Assuming that Judge Preston's statement is correct, have you made any application in any form in behalf of Lee Arenas for release of restrictions on this property?

Petitioners' Exhibit No. 4—(Continued)

A. Not at the present time.

Q. Have you made any selections of any portion of the properties which were the subject matter of the judgment in this case as at least your anticipated selection? A. No.

Q. Have you requested Lee Arenas to make any such selection?

A. Haven't been able to get to see him lately.

Q. Have you communicated with him in an effort to arrange for such selection?

A. No, not by written communication.

Q. Have you in any manner, either orally or in writing, presented to the Secretary of the Interior or other Commissioner of Indian Affairs, a request for approval of any such selection? A. No.

Q. Have you made any assignment orally or in writing of your interest in this agreement to anyone?

A. Just my associates, that I would give them an interest in it.

Q. That was in writing?

A. No, I walked off and forgot it, I had three copies made.

Q. When were the assignments made?

A. When Judge Preston came into the case, I forget the date, Mr. Clark dictated the assignment.

Q. They were in writing and signed by you and delivered to Mr. Clark and Judge Preston?

A. They were put in a file that Mr. Clark and I had, and not to Judge Preston, because Oliver

Petitioners' Exhibit No. 4—(Continued)

said he had them at one time, he put them in that file.

Q. Were those assignments submitted to either the Commissioner of Indian Affairs or the Secretary of the Interior? A. No.

Q. Were they ever requested to consent thereto? A. No.

Q. Of course their consent was never obtained? A. No.

Q. With reference to two documents which I believe are identical in their text and are both dated February 1, 1945, identical with the exception that one is signed by Lee Arenas and the other by Marion Therese Arenas. Judge Preston has furnished me with copies of such documents and has exhibited to me the originals. Who drew up those documents?

A. I started the draft of those, and the same way with the original contract, it was redrafted four, five, or six times by Mr. Clark and myself, and the final draft was his redraft of the one that we had done before that.

Q. Were these documents signed on the day that they were shown, February 1st? A. Yes.

Q. And were you personally present when Lee Arenas and Marion Therese Arenas signed them?

A. I was. And so was Mr. Clark.

Q. Where were they signed?

A. In my office in Los Angeles.

Q. Was Lee present at the same time, and did they sign in each other's presence? A. Yes.

Petitioners' Exhibit No. 4—(Continued)

Q. That was the day following the conclusion of the trial, the second trial, before Judge O'Connor?

A. I don't know—the day following or during the trial.

Q. I think the Statement of Facts shows that that trial was conducted on January 30th and 31st.

A. Let me clarify that one date, since you called my attention to the other. The notary on that is Benton Beckley. Mr. Beckley was at the trial, and whether or not he put his signature on that the day they were actually signed in my office, I do not remember. I know I handed them to him to be notarized. The four of us were sitting there, Mr. Clark, Mr. Arenas, Benton Beckley, and myself. We were all in my office and we had discussed with Lee before that the provisions of this modified contract and the reasons why, and he had agreed to it. That was done some little time before that. Mr. Clark had been quite emphatic in getting all of those details before Mr. Arenas' attention so that he would thoroughly understand it, and the reason why we were asking for a larger percentage, and after it was all explained to Arenas he was perfectly satisfied and so was Marian Therese Arenas at that time. It might have been signed on February 1st or the day before, I don't remember exactly, and whether my day book will show that I don't know. The notary might have put that date in there himself, I don't know. That's the point I want to bring out.

Q. Lee Arenas was present and testified at the trial, and also Marian Therese Arenas?

Petitioners' Exhibit No. 4—(Continued)

A. Yes.

Q. And was Beckley present too? A. Yes.

Q. Did he testify?

A. I don't think so. Benton Beckley had done a lot of work for the Indians and quite a lot for Lee, and whenever they needed him or anything was going on, he was on hand.

Q. Is it your testimony that you were present when these signatures were acknowledged by Benton Beckley?

A. I don't remember if he put his seal on in my presence or not, I know he signed in my presence. I don't remember about the seal.

Q. Now, what conversation did you have with Lee, that you have just referred to, shortly before he and his present wife signed the documents which bear the date February 1, 1945, respecting the reasons for the execution of such documents?

A. Most of that conversation was conducted by Mr. Clark and Mr. Arenas after I had opened the question.

Q. Mr. Clark was present? A. Yes.

Q. Where was the conversation?

A. We had several, some in my office, and I think one or two in Palm Springs.

Q. And in every instance was the present Mrs. Arenas present?

A. I can't swear to that—I can't say whether she was in on all of them at Palm Springs. Some times I would see Lee and she wouldn't be at home, but in my office she was there.

Petitioners' Exhibit No. 4—(Continued)

Q. I assume, Mr. Sallee, that Lee Arenas wouldn't know what quantum meruit meant? Or did you tell him?

A. Yes I did. And so did Mr. Clark.

Q. What did you tell him?

A. The reasonable value for services—that the Court would set the fees accordingly.

Q. I don't like to lead an attorney, but——

A. I am a poor witness, I know.

Q. As a part of that conversation, did you tell him that it was the considered opinion of you gentlemen, in view of what had been done and was needed to be done, that ten per cent would not be a reasonable fee? A. Correct.

Q. Did you tell him what would be a reasonable percentage? A. I did not.

Q. Did Mr. Clark?

A. Not in specific figures, no.

Q. Did Mr. Arenas or his wife ask?

A. No.

Q. Had Judge O'Connor made any statement in the court proceedings of January 30th or 31st, and prior to the time that this document was signed, in which he had announced his conclusion as to what way he would find?

A. Not to my knowledge.

Q. Other than your belief that you had a good cause and such other conclusions as you might draw, you had no definite indication or knowledge how far this matter might go? A. That's right.

Q. You stated a moment ago that Mr. Clark had,

Petitioners' Exhibit No. 4—(Continued)

on several occasions, indicated clearly to Mr. Lee Arenas that the previous arrangements were unsatisfactory in amount, and for that reason you had to have some other arrangement?

A. That's right.

Q. Did Mr. Clark express either in money or percentage, or in any other comparative form, what he and you ever contemplated to be fair and proper as compared to the previous agreement?

A. I never heard him quote a figure. He made the statement: "You know, Lee, we are having to do considerable extra work, and Judge Preston is in the case now, and we have to make arrangements to take care of these fees in a proper way."

Q. Judge Preston conducted the second trial?

A. Yes.

Q. In this particular one-page agreement with Lee Arenas and also the same document with Mrs. Arenas, there is this statement in the last line of the first paragraph thereof: "All to be subject to the rules and regulations of the Department of the Interior." So far as your recollection goes, was any discussion had with Lee respecting that sentence and the import thereof?

A. Not that I remember.

Q. Was this document dated February 1, 1945 ever submitted to any representative of the Government?

A. No.

Q. I take it, then, no request was made for approval or consideration?

A. No.

Petitioners' Exhibit No. 4—(Continued)

Q. And that document was not submitted to any Judge? A. No.

Q. Mr. Sallee, other than the three writings, the one dated November 20, 1940, in which you are named as second party, and which bears the signatures of Lee Arenas and yourself, and the two duplicate documents, each dated February 1, 1945, which are identical except as to the name of the client, one of which was signed by Lee Arenas, and the other by Marian Therese Arenas, were any other writings executed by you and by Lee Arenas covering or purporting to cover an arrangement, contract, or agreement for legal services in connection with this property? A. No.

Q. Mr. Sallee, at the time that you entered into this first instrument or agreement with Mr. Arenas, either immediately on that date or as a part of the surrounding circumstances, did you get similar contracts from other members of the Band and receive compensation from them as a part consideration for this transaction?

A. Referring to November 10th? November 20th? No.

Q. In other words, you did not receive from any other member of this Tribe or from someone in their behalf, any fees or advances in connection with the Lee Arenas case?

A. From time to time contributions towards costs on this, but no fees.

Q. I think that's all, Mr. Sallee.

/s/ DAVID D. SALLEE.

Petitioners' Exhibit No. 4—(Continued)

Interrogation by Mr. Brett of Mr. Oliver
O. Clark

Q. Is there any difference, Mr. Clark, that you can now recall, in what your answers would be in so far as what took place in any conversations in which you participated than as stated by Mr. Sallee?

A. Yes, in several instances. I noted as he testified conversations were had that I recall which he did not testify to, and some things were just a little bit different as he recalled them in so far as my participation is concerned.

Q. With that in mind, I will ask a few questions. When were you first informed about this matter? When did you first take active part?

A. Late June, in the year in which the suit was filed. I think 1940.

Q. And were you introduced to Mr. Arenas by Mr. Sallee?

A. Not at that time. I was later. My best recollection would be during the first two weeks of July.

Q. And where did you first meet Lee Arenas?

A. In Dave Sallee's office.

Q. Were there conversations at that time with Mr. Arenas? A. Yes.

Q. Who were present?

A. Dave Sallee and myself and Lee Arenas.

Q. And the woman who is known as Marian Therese Arenas was not present at that time?

Petitioners' Exhibit No. 4—(Continued)

A. I think not, not until a considerable time later.

(Mr. Sallee: At that time Lee Arenas wasn't married, when we first handled the litigation.)

Q. Mr. Clark, I am not intending to interrogate you concerning the general setup of your work—just as set up in the Statement of Facts—only with matters that concern the ultimate arrangements and execution of the agreement of November 20. I will ask you then: At that particular time was the matter of employment by Mr. Arenas and of the compensation for such employment discussed with Mr. Arenas?

A. As to the employment, yes. Compensation, no.

Q. Will you briefly state your recollection of what was said at that time?

A. Yes. Lee Arenas shook hands with me and said: "Mr. Sallee tell me you help on my case." And I told him that I just beginning to make a study of a great deal of material that they had begun to furnish me, and would furnish to me, and that if, when I had occasion to look more fully into that material, I felt that he had a reasonable chance to win the case, I would then associate with Dave Sallee in the case for him.

Q. I take it then, that, so far as that particular conference was concerned, that is as far as it went with respect to employment?

A. That is true.

Q. When, with reference to the agreement dated

Petitioners' Exhibit No. 4—(Continued)

November 20, 1940, did you next have a conversation with Mr. Arenas?

A. I had several conversations with him, both in Los Angeles and at his home at Palm Springs, about the facts of his case but nothing further as I now recall with reference to compensation until perhaps within a week or so of the time when the first contract was signed.

Q. And that was after the Supreme Court had denied the certiorari, because it was out of time in the Ste. Marie case?

A. I don't remember the instances now in their order, but it seems to me that certiorari was denied in early October, and this contract, as I recall, was executed in November, and we filed our suit in December.

Q. Now, when you had this conversation that was shortly before the document dated November 20, 1940 was executed, where did you have it?

A. The first one at Palm Springs, and the second on the date when the contract was signed in Dave Sallee's office.

Q. With reference to the Palm Springs conference, where was that?

A. At his home, with Dave Sallee, Lee Arenas, and myself.

Q. And will you briefly outline the conversation?

A. I told Lee that I had examined all of the data that had been submitted to me and had rather exhaustively researched the law involved, and had

Petitioners' Exhibit No. 4—(Continued)

also discussed the matter with John Steven McGroarty, who was active in behalf of the Indians, and had determined that I would be willing to accept association with Dave Sallee to bring the suit, and that it would be necessary for us to have some contract in writing with him, Lee Arenas, covering our employment. This was the conversation at Palm Springs, and I told him that it seemed to me that from the information I then had that ten per cent of the amount recovered would probably represent a fair compensation, and that if this met with his approval I would proceed with the preparation of a contract, and he then could come to Sallee's office at Los Angeles for its execution. Subsequently, at Dave's office, I discussed with Lee Arenas and Dave the contract that had been prepared. I do not have any present recollection whether the contract was then signed in Dave's office or whether at a shortly later time it was signed at Palm Springs, but I do remember that I was present when Lee Arenas signed, and I asked him after having read it to him, if he was satisfied with it.

(Judge Preston: Do you think the contract was not signed in the court room?)

A. I am not sure. Frankly, I have in mind that I had drafted a writing that had been signed by Lee Arenas, but that is not the writing that was submitted to Judge McCormick. I was not present when the writing in the form as you have it was signed, because that was in Judge McCormick's office. My recollection is that after this first writing was

Petitioners' Exhibit No. 4—(Continued)

signed by Lee Arenas, Dave stated that he had discussed the matter with Mr. Collett, and that Mr. Collett had suggested that Lee ought to be taken before a Federal Judge, and I told him I had no objection to that. It is my recollection, therefore, that the writing which was signed by Lee, as I have testified, was destroyed, a new writing was prepared, and that was taken by Dave and Mr. Collett to the Federal Court, but I was not present when that happened.

Q. Mr. Clark, having in mind the possibility, in view of your most recent statements, that the document dated November 20, 1940 is not the same document as you saw signed by Lee Arenas——

A. I know it is not.

Q. Were the provisions substantially similar?

A. In substances, yes, but not as I recall all of the recitations about the regulations of the Indian Department and the Interior Department.

Q. Those were added?

A. Yes. The reason I make that statement is because I never had any confidence from the beginning that the Government or any department would ever approve any contract for the employment of any lawyer to file that case, and I told Dave that I wasn't interested in spending one minute of my time on it, but that I had no objection to Dave and Collett doing whatever they thought might be desirable to obtain such a consent, but that as far as I was concerned I was going to base the recovery of my compensation upon my belief that in the cir-

Petitioners' Exhibit No. 4—(Continued)

cumstances of that case, in the event we won, the Court would find that we were entitled to a reasonable compensation for what we accomplished payable out of the property involved.

Q. Mr. Clark, you have several times mentioned a Mr. Collett, and so did Mr. Sallee. It is my recollection that in the various instruments which were offered in evidence in your second trial there were documents which bore the name of some Government official by the name of Collett. Is that the same man?

A. I don't think so. I met this man four or five times and had brief conversations with him, and the man I had in mind was not then a Government agent, he was interested in Indian affairs for a long time, as I was told.

Q. Following the date when you were informed, and you have now learned, that Mr. Arenas and Mr. Sallee appeared before Judge McCormick, were you informed of that fact and of the execution of the document? A. Yes.

Q. Were you informed as to the contents as it had been redrawn? A. Yes, I saw it.

Q. And you then performed whatever services you did under arrangements that you made with Mr. Sallee under that agreement?

A. Until the subsequent agreement was agreed upon.

Q. That is between November 20, 1940 and February 1, 1945, you had no separate arrangement with Mr. Lee Arenas?

Petitioners' Exhibit No. 4—(Continued)

A. I never had any separate arrangement with Lee Arenas, but I did negotiate with him for a change in the basis of our compensation many months before the second writing was executed, and in fact at about the time Judge Preston came into the case.

Q. And that was at the time that the consultations were had which led up to the petition for certiorari in the Supreme Court?

A. That's right.

Q. At that time you had one or more conversations with Lee Arenas?

A. You mean at the time the petition for certiorari was in prospect?

Q. It may be that the time was identical, but I had reference to your earlier statement that you had had a number of negotiations leading up to the second agreement prior to its execution.

A. Yes, and they began at the time when the preparation for certiorari was in prospect.

Q. In connection with those conversations, who were present?

A. Lee Arenas and myself on some of the occasions, and Dave Sallee on others.

Q. And where were they?

A. Some at Palm Springs at the home of Arenas, and others at Dave Sallee's office.

Q. Were any others present besides Lee Arenas, Dave Sallee, and yourself?

A. I have in mind, but indistinctly, that Mrs. Arenas was there on one of the occasions when I

Petitioners' Exhibit No. 4—(Continued)

went to Palm Springs alone. By that I mean without Dave. Then later and before the contracts were signed, Mrs. Arenas was with Lee in Dave's office, and I was there too.

Q. Just so there will be no question about it, Guadeloupe was deceased, and the Mrs. Arenas you now refer to is the one who signed the document on February 1, 1945, Marian Therese Arenas?

A. Yes.

Q. Will you briefly state the gist of these conversations leading up to the new agreement?

A. When it became necessary to petition the United States Supreme Court, I went to Palm Springs and talked with Lee. I told him that it would be necessary for me and Dave to go to Washington and be admitted to the Supreme Court before we could file a petition for certiorari, but that I felt, in view of the importance of the litigation and its then condition, that it would be very much to his advantage to employ another lawyer who had had experience in practice in the United States Supreme Court, and that I had spoken to Judge Preston, who had formerly served in the State Supreme Court on the bench and who had also served the Government in several important capacities, and that I had come to recommend to him that Judge Preston be employed in association with Dave and myself for the purpose of the petition to the United States Supreme Court and the conduct of the case thereafter if we won in that court. I told him that this would, of course, mean the payment of addi-

Petitioners' Exhibit No. 4—(Continued)

tional compensation to the lawyers, and that I had not discussed with Judge Preston what his fee would be, but if the plan met with Lee's approval I would do that and talk with him further. Lee told me that he would be very glad for that to be done and for me to go ahead. I then returned to Los Angeles and presented the matter in detail to Judge Preston, and as I recall, a period of at least two weeks elapsed, because Judge Preston was rather reluctant to engage in the litigation, but I continued to press the matter. He made a trip to the North and upon his return called me and said that he would be willing to be associated in the case. I then contacted Lee Arenas. It is my impression that Dave had called him to Dave's office and that Dave was present on this occasion. At the time I made this report I told Lee that Judge Preston had agreed to the association and that it would be necessary to prepare an additional contract covering our compensation, but that we were so busy in doing the things that had to be done in the case because we were working under a time limit, that I would not undertake to prepare that contract until other things had been attended to, but that when I did prepare the contract it would be upon the basis of a reasonable fee for the work done, having in mind what should be accomplished in event we won it, and the fee to be fixed by the United States District Court here, and I explained that to him in detail as to how it was fair, I thought, to us and fair to him, so that the Court knew exactly what the

Petitioners' Exhibit No. 4—(Continued)

picture was and the Court then could say what was a reasonable fee to us and what was reasonable for Lee to pay. He told me it was perfectly fair and to go ahead and let him know when I wanted the new contract signed. The matter went on for a long time before I got around to the drafting of the contract with Dave, and then it eventuated into the signing of the later and last contract. When that contract was signed I read it to Lee and explained it to him, reminded him of the conversation that we had had before in reference to it, and Lee in substance said it was acceptable to him, and it was signed.

Q. When you contacted Judge Preston did you relate to Judge Preston, in substance, the representations and statements that you had made to Mr. Arenas, such as you have just stated?

A. I did relate to Judge Preston what I had
I [Mathes, J]
said to Lee, and ~~Lee said he~~ had contacted Judge Preston before I suggested him to Lee.

Q. Before Judge Preston accepted employment you related to him, in substance, the statements you have just related? A. I did.

Q. Did you also disclose to Judge Preston the text of the agreement of November 20, 1940?

A. My recollection is that I brought a copy to Judge Preston's office.

Q. And left it with him, before Judge Preston entered into the employment of the case?

A. Yes.

Q. At the time you commenced these conversa-

Petitioners' Exhibit No. 4—(Continued)

tions with Mr. Arenas looking toward a modification of the agreement of November 20, 1940, had you helped perform any legal services as counsel for Mr. Arenas in this case?

A. Yes. I had begun the suit and carried it through the Circuit Court and to the point where the petition for certiorari was required to be filed before I discussed with Lee the modification of the original contract.

Q. Did you suggest to Lee Arenas that he obtain or seek or get the advice of any independent counsel before he modify the agreement?

A. No, I did not. I did suggest to him that he discuss the matter with the local Indian agent, whose name I now forget, at Palm Springs.

Q. Mr. Veith? V-e-i-t-h?

A. Yes, I believe that is the name. I had met him and heard of him and had every confidence in him, esteemed him very highly, and knew he was a friend of the Indians, and I asked Lee to talk to him about the advisability of doing the thing I had suggested.

Q. You knew Mr. Veith was not a lawyer, or did you believe at the time that he was?

A. No. That never occurred to me. I was thinking of him as a friend of the Indians and a man of such responsibility that the Government had made him the local Indian agent.

Q. Mr. Clark, so far as your knowledge serves you, do you know whether or not Mr. Lee Arenas obtained or sought any independent advice before

Petitioners' Exhibit No. 4—(Continued)

he accepted your suggestions and signed the agreement of February 1, 1945?

A. That question calls for hearsay, but I can say this as to what I understood. I understood from John Steven McGroarty that he and some woman active in behalf of the Indians, had discussed with Lee Arenas and other Indians at the town of Palm Springs the possibility of doing the very thing that

Judge Preston and I suggested, namely, bringing in ~~John Steven McGroarty~~ Mr. McGroarty [Mathes, J]

~~Groarty~~, between the time I first spoke to Judge Preston and the time when Lee Arenas finally told me to go ahead, called me to his home one evening and said to me that he thought the idea was one of the most brilliant things that had been suggested in the course of the litigation, and that he had talked with this woman, whose name I don't remember, but I can get it, and that Lee was satisfied and he knew that this was what was going to be done. I do remember at a later time I talked with Mr. Berry, the local agent, about it, and he congratulated me upon the fact that I had thought of doing it, and had been able to do it, namely, to get Judge Preston into the case.

Q. Did you tell Mr. Arenas, as a part of your conversation leading up to the signing of the documents dated February 1, 1945, that it was necessary for him to sign an agreement of that kind before further proceedings could be had in his case?

A. No. Our relations were such that if Lee

Petitioners' Exhibit No. 4—(Continued)

Arenas told me to go ahead on the basis of our oral understanding, it was just as good as if it was in writing, and the fact that that contract wasn't signed until after we had gone through the United States Supreme Court and had come back here for the trial of the case——

Q. Did you tell Mr. Lee Arenas in any of the conversations following the effective date of November 20, 1940 and prior to February 1, 1945, that you could go no further with his case after the Circuit Court of Appeals had affirmed the summary judgment unless he would execute an agreement covering a larger fee? A. No.

Q. What did you tell him in that respect?

A. I told him I thought it was advisable that Judge Preston be associated in the case, but that if he did not agree to it I would go to Washington and become admitted to the Supreme Court and file the petition while I was there, because I at all times had in mind that if Judge Preston would not become associated I would go ahead with the litigation through the Supreme Court.

Q. Did you contemplate that if you had gone through with the litigation to the Supreme Court and had obtained a reversal of the Circuit Court opinion that you would conduct further proceedings in whatever courts might be required until the trust patent was obtained?

A. I did. In other words, I assume you want to know if I at any time suggested to Arenas that if I and Dave would go ahead without any additional

Petitioners' Exhibit No. 4—(Continued)

lawyer, we would expect any compensation in addition to what our original contract provided for. No, I never had that in mind. I never suggested it to Arenas and the only reason the new contract for compensation was made was because of the additional services that we were able to obtain from Judge Preston being in the case.

Q. Did you personally receive any monies in the way of fees, either directly or indirectly, from Lee Arenas for costs and expenses in the case?

A. Only through Dave Sallee, and not then to the extent of what expenses I incurred.

Q. Do you keep books of account on your cases?

A. Not on that case. My fee was entirely contingent. The only expenses I received was when we went back to Washington to argue the case in the Supreme Court. Dave gave me the money for that, and then again when we went to San Francisco to argue the matter in the Circuit Court on the Government's Appeal he gave me the expense money for that.

Q. You refer to Judge Preston and yourself?

A. Yes. Otherwise Dave handled the payment of expenses, not I.

Q. You don't know, then, from what source the money came?

A. No, excepting as Dave told me, and the Indians told me contributions were made in part by Lee Arenas and his wife, and in part by some of the other Indians.

Q. Did you ever present either the agreement

Petitioners' Exhibit No. 4—(Continued)

of November 20, 1940 or the agreement, or either of them, of February 1, 1945, or any other writings which were directed to, and the contents of which evidenced some form of negotiations or agreement for your employment as counsel with Lee Arenas, to any representative of the Federal Government?

A. No.

Q. You never obtained any approval?

A. None whatever.

Q. Aside from the document dated February 20, 1940 and the two documents dated February 1, 1945, were there any writings which you know of which were executed by Lee Arenas and which you purport to have acted under as employment contracts?

A. None except the first, which was only effective at most for a few days and torn up, and superseded by the one presented to Judge McCormick.

Q. And that was done with Mr. Arenas' consent?

A. Yes.

Q. Did you have any personal written communications in connection with either of these agreements or contracts or in connection with your employment or activities in behalf of Lee Arenas, with any representative of the Federal Government?

A. None whatever.

Q. Have you ever submitted a statement, account, or any other form, of rendering of a voucher or claim, for your services in this case to any representative of the Federal Government aside from the joining in the petition? A. No.

Q. Have you ever received, either orally or in

Petitioners' Exhibit No. 4—(Continued)

writing, any communication from any representative of the Federal Government which either expressly or impliedly informed you not to make any such application or to render any such statement?

A. No.

Q. Were you present when Mr. and Mrs. Arenas signed the documents dated February 1, 1945?

A. Yes.

Q. Where did they sign them?

A. In Dave Sallee's office.

Q. Were both of them present at the time they were signed—did they sign in each other's presence?

A. Yes.

Q. Was Mr. Benton Beckley present?

A. My recollection is that he was. He seems to me to be the one who came to my office and said Lee Arenas and his wife are down there waiting for me.

Q. Do you know definitely the date on which they signed was February 1, 1945?

A. No, I have absolutely no recollection of that.

Q. Did you see any formal acknowledgment of their signature before the notary?

A. I have absolutely no recollection of that.

Q. Did you have knowledge, either by communication from Mr. Sallee orally, or by being disclosed to you through the writings, that the document dated November 20, 1940, had been submitted to the Office of Indian Affairs?

A. Yes, I did.

Q. And were you likewise informed that at some date, not definitely fixed here but approximately in 1942, the United States, through the Office of In-

Petitioners' Exhibit No. 4—(Continued)
 dian Affairs, had refused or declined to approve the contract?

A. I was told by Dave Sallee and shown the letter that they had refused to take action upon them, and had returned the contracts.

Q. Did you communicate with Judge Preston?

A. I don't remember.

Q. I think that's all, Mr. Clark.

/s/ OLIVER O. CLARK

Interrogation by Mr. Brett of Mr.
 John W. Preston

Q. As I understand it, the first time you came into the matter was when your services were solicited by Mr. Clark?

A. That's right.

Q. And that at that particular time did you meet Lee Arenas, or was it at a later period?

A. Much later I think.

Q. You have heard Mr. Clark's statements that have just been made? A. Yes I have.

Q. Would you add to or change any of those statements?

A. I have nothing to add. Some I recall, and some I don't.

Q. We made provision here that if there are to be any corrections, they will be made, and if—

A. The Statement of Facts that I have delivered to you contains a recitation in brief of my activities in the case, giving days and dates, etc. I started in September 1943.

Petitioners' Exhibit No. 4—(Continued)

Q. At the time that you started in that employment in 1943, you were informed of the provisions of the document dated November 20, 1940?

A. Well, I have a reasonably good memory that I knew something about it—that they had a contract, and for ten per cent, and that I didn't think it was enough, I remember that.

Q. Do you recall whether you personally told Lee Arenas that you didn't think it was enough before you started in on your employment?

A. I didn't do that.

Q. I have in mind the document dated February 1, 1945 was after you had performed substantial portions of your services?

A. You are right. I don't think I had any personal talk with Lee Arenas or that I informed him of anything.

Q. Whatever information he had came through others?

A. Yes; that's right.

Q. You were not present when the documents dated February 1, 1945 were signed?

A. I was not.

(Mr. Brett: Mr. Clark, who prepared the documents dated November 20, 1940, the ultimate documents?

Mr. Clark: I think I did.

Mr. Brett: The one presented to Judge McCormick?

Mr. Clark: No, I think some changes were made by Dave and then a Mr. Collett, after the signing of the one we had prepared.

Petitioners' Exhibit No. 4—(Continued)

Mr. Brett: You don't know, definitely, Mr. Clark, of your own knowledge, who prepared the document dated November 20, 1940?

Mr. Clark: In the form as signed by Judge McCormick, no.

Mr. Brett: Mr. Clark, who prepared the documents which are identical except as to the names of the clients, the documents dated February 1, 1945?

Mr. Clark: I did.)

Q. Now, Judge Preston, did you ever, either orally or in writing, submit either of these contracts or agreements dated November 20, 1940 or February 1, 1945, respectively, to any representative of the Federal Government? A. I did not.

Q. Did you orally, or in writing, submit any statement, voucher, or other form of claim, to any representative of the Federal Government? As a claim for either repayment of expenses or payment of fees?

A. I have made no claim to the Government asking either for expenses or for compensation.

Q. Is there any written document existent of which you have knowledge and in which you participated as a party or under which you claimed to have been employed and to have performed services for Lee Arenas, other than the document dated November 20, 1940 and the two documents dated February 1, 1945? A. I know of none other.

Q. You have submitted to me, I take it in view of what you have said, a two-page communication dated January 2, 1948, which is headed "Statement of Account, etc." and which contains a number of

Petitioners' Exhibit No. 4—(Continued)

entries indicating dates, the general character of the expenditures or receipts, in two columns, the left-hand of which apparently is a matter of receipts, and the righthand a matter of disbursements—is that an accurate statement and record of your book account?

A. It is supposed to be a correct transcript of my records.

Q. Does it constitute all of the monies received and expended by you in connection with this particular litigation? A. Yes.

Q. And from whom did you receive the various receipts?

A. The amounts I received were usually, and I think almost entirely, from Mr. Sallee direct, with the possible exception of one item. I think the item dated June 15, 1946, for printing brief on appeal, \$86.20, was paid to me direct by Mrs. Arenas when she appeared in this office, accompanied by three or four other Indians, and I gathered the impression that the other Indians had contributed certain portions of that sum. Other than that, all receipts were from Mr. Sallee, as I recall it.

Q. Incidentally, I note that I inadvertently erred in describing the document. Your disbursements appear in the lefthand column, and your receipts in the righthand. You referred to the item of June 17 rather than June 14—the printing of the brief on appeal? A. That's right.

Q. And without going into further detail, each and every item as set forth as an expenditure is the

Petitioners' Exhibit No. 4—(Continued)

actual amount you spent in connection with this case? A. Yes.

Q. And was necessary in the performance of your duties in prosecuting the case? A. Yes.

Q. May it be stipulated that a copy of this statement may be made an exhibit?

A. Yes, exhibit to my statement.

Q. Had you ever suggested to Mr. Arenas, Judge Preston, that he seek independent advice before he modified his contract of November 20, 1940 and prior to the time when he signed the documents dated February 1, 1945?

A. I had no direct communication with Mr. Arenas on that.

Q. You had talked to him on other matters in the case, because you tried the case before that date, didn't you?

A. I was at Mr. Arenas' house in Palm Springs once, and I examined Mr. Arenas as a witness at the time of the trial. I had a few talks with him in the corridor of the court room, and I don't remember ever talking to him any other time.

Q. I assume you talked to him before you put him on the stand?

A. That's my custom to talk to a witness first, but I swear I don't remember talking to him.

Q. I wasn't present at the trial. Judge Preston, you have had broad experience both on the bench and as an attorney—now, having in mind Mr. Sallee's previous statements and Mr. Clark's previous statements as to what they told Mr. Arenas, is it

Petitioners' Exhibit No. 4—(Continued)

your opinion that Mr. Arenas was sufficiently informed of English and sufficiently educated to understand and comprehend the information and advice which he was being given?

A. I certainly think he was competent at that time to transact business—as competent as the ordinary individual of the White Race. He showed on the witness stand intelligence that was very noticeable—he was commended by the Judge as being an intelligent witness—and if you will recall, the contract is simply a quantum merit to be fixed by the court. It doesn't require a great deal of advice to make such a contract, and I think also it is valid under the law.

Q. Did you ever, at any time, discuss with Mr. Arenas, in connection with either of these documents, the one dated November 20, 1940, and the one dated February 1, 1945, the references therein made to the documents being subject to actions by the Federal Government through the Department of the Interior or Office of Indian Affairs?

A. No, not on either of them, at any time.

Q. These are the only two agreements you are relying on? A. Yes.

Q. And you had no written communications with any Government official in connection with either your employment or the payment of your fees or any of the details in connection with your services?

A. I very early got hold of the Barnett decision,

Petitioners' Exhibit No. 4—(Continued)
and my course of conduct was guided by that
decision.

Q. That's all, Judge. Thank you.

/s/ JOHN W. PRESTON

Admitted in evidence 2/10/48.

[Endorsed]: Filed Feb. 10, 1948.

PETITIONERS' EXHIBIT No. 4-A

In the District Court of the United States, Southern
District of California, Central Division

No. 1321—O'C—Civil

LEE ARENAS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

STATEMENT OF FACTS

Preliminary Work

Petitioners Clark and Sallee did the preliminary work looking to filing of the Complaint and in fact handled the litigation from July 1940 until September 1943. Prior to the filing of the action and during the months of July, August, September and October, 1940, these counsels spent approximately 40 days in the study of the voluminous records and other data available, including, of course, the legal

Petitioners' Exhibit No. 4-A—(Continued)

questions involved in the contemplated suit. At least four trips were made to Palm Springs in connection with the matter and three visits to the bedside of Mr. Sloan, an attorney who had handled much Indian litigation and was the leading counsel in the so-called St. Marie case. During this period the following events had occurred: About July 1938 eighteen of these Palm Springs Indians, a majority of the twenty-four Indians who had received allotments under the 1927 proceedings, began an action in this Court entitled, "St. Marie et al vs. United States", which had for its object the identical relief Lee Arenas has secured in the present action. On the 23rd day of July, 1938 this Court, the Honorable Leon R. Yankwich presiding, denied in toto the claims of these eighteen Indians (24 Sup. 237). An appeal was taken to the Circuit Court of Appeals, Ninth Circuit, where on the third day of January, 1940 this judgment was affirmed (108 Fed. 2d 876). Certiorari was sought from the Supreme Court. This was denied on October 4, 1940. This Petition, however, did not settle the legal questions, because it was denied on the ground that it had been filed one day too late. This was the situation that confronted counsel for Lee Arenas on December 24, 1940 when this action was begun. The United States was a determined adversary during the pendency of the St. Marie case and continued to be such throughout the pendency of this cause, and still is a determined and persistent adversary.

Petitioners' Exhibit No. 4-A—(Continued)

Chronology of the Present Action

This action was instituted by Lee Arenas on the 24th day of December, 1940. The United States was made defendant pursuant to the Act of August 15, 1894 (25 U.S.C.A. Sec. 345), which said statute authorized any person of Indian blood who claimed an allotment under any Act of Congress to have the validity of his claim declared by a judgment of the District Court.

The Agua Caliente or Palm Springs Band of Mission Indians claimed their rights to allotments by virtue of the acts and proceedings taken by a duly appointed Allotting Agent, who first made a series of allotments to each Indian of the Tribe on June 21, 1923, and later made a reallocation to a part of them only on May 9, 1927.

This action was taken pursuant to the provisions of the Act of June 12, 1891, (26 Stat. 712-14) amended by the Act of June 25, 1910, (36 Stat. 855-863) and the Act of March 2, 1917 (39 Stat. 976). The 1923 allotment proceedings included all of the Band of fifty Indians. These proceedings were nullified because allotments were not made at the special instance and request of the individual Indians.

The proceedings in 1927 were taken pursuant to the written request of twenty-four Indians of the said Tribe. Lee Arenas and Guadalupe Arenas, his wife, were included in both the 1923 and the 1927 allotment proceedings. Francisco Arenas, father of Lee Arenas, died October 4, 1924, and Lee's brother

Petitioners' Exhibit No. 4-A—(Continued)

Simon, died February 18, 1925. The deceased Indians were named in both the 1923 and the 1927 allotment proceedings. Because of their death prior to May 9, 1927, their allotments were adjudged invalid. Guadaloupe Arenas was also dead at the time this action was begun, but she was alive on May 9, 1927.

Perilous Course of the Present Cause

The action was instituted December 24, 1940. A first and second amended complaint was filed in the action in the year 1941, the latter being a document of seventy-two paragraphs, forty-eight printed pages, filed October 27, 1941. Motions to dismiss or, in the alternative (two in number) summary judgments were made by the United States supported by two affidavits and a certificate of the acting Commissioner of Indian Affairs. The motions were heard on the 26th day of January, 1942, and Summary judgment was granted on March 6, 1942.

In preparation of the three complaints and the resisting of these motions Messrs. Clark and Sallee performed much research and made many court appearances. The time spent by these two counsel is estimated at four days in Court and five days in office research and preparation of documents.

On June 3, 1942 an appeal taken from the summary judgment entered on March 6, 1942, on which a record was prepared consisting of 69 pages, became action No. 10219 of the records of the Circuit Court of Appeals, Ninth Circuit.

An Opening Brief of 45 pages with an appendix

Petitioners' Exhibit No. 4-A—(Continued)

of six pages was prepared and filed on December 16, 1942. The United States responded with a brief consisting solely of a reliance upon decision in the St. Marie cases above referred to (*supra* p. 2). Appellant replied with a brief of seven pages.

The cause was orally argued March 8, 1942. The judgment of the Court below was affirmed by opinion and judgment filed June 30, 1943. (See 137 F. 2d 199). Appellant duly filed on July 23, 1943 his Petition for a rehearing consisting of three pages which Petition was denied on August 4, 1943. Messrs. Clark and Sallee consumed approximately 10 days in office preparation of the appeal and one day in oral argument before the Circuit Court of Appeals.

On September 7, 1943 John W. Preston became one of the counsel of record for Lee Arenas. A transcript of record was then prepared to accompany a petition to the Supreme Court for certiorari, consisting of 78 pages. The whole subject of allotments was then reexamined in the office of John W. Preston, both by him and other members of his staff, during which approximately 15 days were spent in research. The result of said labor was the Petition for Certiorari which was filed October 29, 1943. This document, including a short appendix, covered 23 pages. The United States filed a brief of nine pages in opposition to this Petition. The Petition was granted on the 20th day of December, 1943 by the Supreme Court. On February 25, 1944, counsel for Arenas prepared and filed a supplemental brief

Petitioners' Exhibit No. 4-A—(Continued)
consisting of 25 pages, which was a careful examination of the statutes and decisions upon the subject of Indian allotments.

In the preparation of the Petition for Certiorari and the Supplemental Brief, John W. Preston and the members of his staff consumed approximately 15 days.

On March the 6th and 7th, 1944 Messrs. Preston and Clark attended a hearing of the cause before the Supreme Court in Washington, D. C., and on said days argued said cause before said Court. They also spent one day in searching records in the General Land Office and in the office of the Solicitor of the Department of the Interior.

On May 22, 1944, the Supreme Court of the United States rendered its opinion and judgment reversing the judgment below and remanded the cause for a trial on merits (322 U.S. 419, 64 S. Ct. 1090, 88 L.Ed. 1363).

On the 27th day of June, 1944, Mandate duly issued to the District Court of the United States for the Southern District of California and it was spread on the records of said District Court on the 12th day of September 1944. During the period from September 1943 to September 1944, Petitioners Clark and Sallee estimated their time at legal work, including travel time to Washington, D. C., and Palm Springs at approximately 50 days.

Thereupon, Petitioners prepared a Third Amended Complaint in the action to conform to the rulings of the Supreme Court. The same was duly filed on

Petitioners' Exhibit No. 4-A—(Continued)
the 9th day of January, 1945, and consisted of 22 printed pages and four causes of action. On the 15th day of January, 1945, the United States filed its Answer to said complaint which consisted of three defenses to each count of the complaint and covered 16 printed pages.

In a restudy of the cause following the reversal of the judgment and in the preparation of the Third Amended Complaint all counsel utilized approximately 20 days of office work.

Elaborate preparation for trial of the cause preceded January 9, 1945. This preparation included further examination of the law and the securing of witnesses particularly the last witness, Harry E. Wadsworth, the Alloting Agent then a man of more than eighty years of age.

On January 9, 1945, the trial Judge made an order on pretrial and a supplemental order on January 15, 1945. Under these pre-trial orders counsel for the respective parties spent approximately five days in the consideration of matters that could be stipulated to. Twenty-seven different items of fact and exhibits that could be introduced in evidence were stipulated and on January 15, 1945 we represented to the Court that further stipulations would be made and the supplemental order resulted.

Under the supplemental order the parties agreed upon some 30 additional items and reported same to the Court on January 30, 1945.

Petitioners' Exhibit No. 4-A—(Continued)

The cause was tried in two days, January 30th and 31st, 1945.

In addition to the matter admitted in evidence under the pre-trial orders, there was received 49 exhibits styled Court exhibits and exhibits "A" to "F", inclusive, were accepted for the defendant. The exhibit styled "F" was a document containing a discussion of the Mission Indian problems from 1891 to date and it had as a sub-exhibit, 107 pieces of writing. This exhibit contains 300 pages of the record, Vol. 2, pp. 300 to 603. Only four witnesses gave oral testimony. When the evidence was concluded the trial judge made the following observation:

"I will make first some remarks. I am inclined to say I have never had a better presented case from the standpoint of the facts, particularly, because you attorneys on both sides very sensibly got together and agreed on these exhibits, which has saved the Court a great deal of time. Very commendable. It shows the efficacy of the pre-trial, of which there was some little hesitancy about receiving on the part of the older practitioners, and I might say myself, a hesitancy to accept any innovations in trial work when we have been long years accustomed to one procedure. I think counsel on both sides will see that it had worked out very well in this case."

Proposed findings of fact and conclusions of law and judgment were prepared by petitioners and cover 35 printed pages in the record. They were accepted by the trial court as drafted and without

Petitioners' Exhibit No. 4-A—(Continued)
change. This work consumed approximately five days.

The United States on the 9th day of June, 1945, lodged with the Court a written motion to vacate the judgment, also the conclusions of law and to amend in numerous particulars the findings of fact and conclusions of law.

The motion was resisted by petitioners who made an oral argument against the motion. The Court submitted the motion on June 11, 1945, and denied the same by order made on July 10, 1945.

Thereafter, and on the 8th day of August, 1945, the United States filed its Notice of Appeal from the whole of the Judgment. A transcript consisting of 608 printed pages was prepared by Counsel for the United States, with the aid of petitioners. Elaborate briefs were prepared and filed by both appellant and appellee. Appellee's Reply Brief consisted of 39 printed pages.

The cause came on for hearing in the Circuit Court of Appeals at San Francisco on the 27th day of August, 1946, when two counsel for Appellee appeared and argued the cause.

On December 12, 1946, the Circuit Court of Appeals affirmed the judgment in part and reversed it in part. The net result was that plaintiff's right to the allotments selected by him and his wife, Guadalupe Arenas, were validated and the claims for the allotments in the name of Francisco Arenas and Simon Arenas were declared invalid.

Appellee, being dissatisfied with the decision re-

Petitioners' Exhibit No. 4-A—(Continued)

specting the allotments claimed in the name of Francisco Arenas and Simon Arenas, prepared and on January 12, 1947 filed a Petition for Rehearing. The same was denied January 14, 1947.

Petitioners thereupon prepared a record as the basis for an application for Certiorari to the Supreme Court of the United States, which consisted of 676 printed pages. A Petition for Certiorari, consisting of 32 printed pages was prepared and filed within the time allowed by law. But the Supreme Court denied the same by order dated June 9, 1947. During the period from January 9, 1945, until the conclusion of the case, Oliver O. Clark estimates his time at 27½ days. David D. Sallee estimates his time at 10 days. John W. Preston estimates his time at 40 days. This period covers the second trial of the action, the defending of the judgment in the Circuit Court of Appeals and the preparation of the Petition for Certiorari to the Supreme Court of the United States. The Judgment in said cause contained the following provision:

“The Court hereby retains jurisdiction over this action and the subject matter thereof for the purpose of adjudicating the reasonable sums that shall be allowed and paid to the attorneys of record for plaintiff for their services rendered to him in the action and for expenses necessarily incurred by them in his behalf in the prosecution thereof, and for the purpose of making all necessary and proper orders, judgments and decrees for the securing and

Petitioners' Exhibit No. 4-A—(Continued)
 payment of all such sums so found due him and
 owing by the plaintiff to said attorneys.”

The litigation having terminated the petitioners
 filed with the Trial Court their Petition for a Sup-
 plemental Decree fixing attorneys' fees and for
 means of collecting same.

The value of the lands recovered for Lee Arenas
 is considerably in excess of One Million Dollars
 (\$1,000,000.00).

Admitted in evidence 2/10/48.

PETITIONERS' EXHIBIT No. 4-B

[Letterhead of John W. Preston]

January 22, 1948

STATEMENT OF ACCOUNT re LEE ARENAS v. USA

1943

October 25—Pd to Cropley, Clerk, deposit for printing brief.....	\$ 60.00	
October 28—Rec'd from Sallee.....		\$ 60.00
December 9—Collect telegram from Cropley	1.38	
December 28—Pd to Cropley, Clerk, copies of record	35.00	
December 28—Rec'd from Sallee.....		35.00

1944

January 12—Collect telegram from Cropley	1.38	
February 26—Pd. transportation to Wash., D. C.	138.49	
February 28—Rec'd from Sallee.....		138.49
March 7—Cash re expense to Washington....	130.00	
March 13—Cash re expense to Washington....	100.00	
March 10—Collect wires from Cropley.....	3.55	
April 28—Rec'd refund re transportation.....		80.50
July 11—Refund from Cropley.....		14.54
December 1—Pd for copy of decisions.....	.40	
December 1—Expense for trip to Riverside and Palm Springs.....	25.00	
December 13—Photostats of schedule.....	2.75	

Petitioners' Exhibit No. 4-B—(Continued)

1945

January 23—To Rosslyn Hotel for Wadsworth	22.00	
January 15—Refund re photostats.....		2.10
February 14—Phone to Bakersfield—Wadsworth	1.06	
April 16—Phone to Vaeth, Palm Springs.....	1.00	
April 26—To F. M. Hole, copy of opinion....	16.65	
May 7—Rec'd from Sallee.....		16.65
May 15—Two phone calls to Palm Springs....	2.00	
May 17—Certified copies of judgment.....	6.15	
December 4—Appearance fee re appeal.....	10.00	

1946

June 15—Printing brief on appeal.....	86.20	
June 17—Paid by the Tribe.....		86.20
September 22—Expense re trip to S. F. hearing	50.00	
September 23—Rec'd from Sallee.....		150.00
September 23—Rec'd from Mrs. Arenas.....		50.00
September 16—Phone calls re S. F. hearing	2.25	

1947

January 8—Pd. O'Brien for copy of opinion	5.00	
February 4—Wire to Mrs. Arenas.....	2.48	
February 4—Filing Petition for rehearing....	4.20	
March 17—Phone to O'Brien.....	2.25	
March 7—Rec'd from Sallee.....		100.00
March 10—Rec'd from Sallee.....		25.00
March 7—To Cropley, fee re Petition for Writ of Certiorari.....	25.00	
March 7—To O'Brien for preparation of record	100.00	
March 25—To Cropley, balance of deposit re writ	45.00	
April 14—Telegrams to Washington, D. C.....	3.99	
May 8—Printing Petition for Writ.....	92.52	
May 14—To O'Brien, balance for preparation	69.41	
July 14—Refund from Cropley.....		31.40
July 22—Wire from Cropley.....	1.94	
August 22—Certified copy of Judgment.....	1.50	
October 30—To constable re service on Arenas	1.00	

Petitioners' Exhibit No. 4-B—(Continued)

1947

November 21—To constable re service on

Arenas 2.00

December 16—Phone calls to Palm Springs 5.25

	<u>\$1,056.80</u>	<u>\$ 789.88</u>
BALANCE DUE		266.92

	<u>\$1,056.80</u>	<u>\$1,056.80</u>
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Admitted in evidence 2/10/48.

PETITIONERS' EXHIBIT No. 5

In the District Court of the United States, South-
ern District of California, Central Division

No. 1321—O'C—Civil

LEE ARENAS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

STIPULATION

It Is Hereby Stipulated by and between petitioners, John W. Preston, Oliver O. Clark and David D. Sallee, and respondents, United States of America and Lee Arenas (by United States of America), that the statements of petitioners respecting the facts relating to the manner in which they were

retained and employed as attorneys for Lee Arenas, the nature and contents of their contracts, the services performed thereunder, the amounts of their expenditures and the purposes for which such expenditures were made, the amounts advanced to them by or for Lee Arenas and the manner in which such advances were obtained, such actions, oral or written, as were taken pursuant to their contracts, both with Lee Arenas and representatives of the United States of America and any related facts material to the question of what constitutes a reasonable attorney fee for their services, may be taken in the office of John W. Preston, 712 Rowan Building, 458 South Spring Street, Los Angeles, California, at 2:00 p.m., Wednesday, January 28, 1948, upon questions put by counsel for respondents, that such statements may be reduced to writing and corrected, if corrections are required, either in the form of a written statement or written stipulation and subscribed to by said petitioners and may then be used by either parties in the same manner as if the statement was in the form of a written deposition.

It Is Further Stipulated that if upon completion of such statement or stipulation, either petitioners or the Attorney General of the United States shall require the taking of a formal deposition, the taking, formulating and subscription of such statement

or written stipulation shall not preclude such further proceedings.

Dated: January 28, 1948.

/s/ JOHN W. PRESTON,

/s/ OLIVER O. CLARK,

/s/ DAVID D. SALLEE,

Petitioners.

JAMES M. CARTER,

United States Attorney,

IRL D. BRETT,

Special Assistant to the

Attorney General,

/s/ By IRL D. BRETT,

For United States of America and Lee Arenas,
Respondents.

Admitted in evidence 2/10/48.

[Endorsed]: Filed Feb. 10, 1948.

PETITIONERS' EXHIBIT No. 6

AGREEMENT

This Agreement made and entered into this 20th day of November, 1940, by and between Lee Arenas, a duly enrolled member of the Tribe of Indians known as the Agua Caliente (Palm Springs) Band of Mission Indians of California, Party of the First Part, and David D. Sallee, attorney at law, residing at Los Angeles, California, Party of the Second Part,

Witnesseth:

That the Party of the First Part hereby contracts

Petitioners' Exhibit No. 6—(Continued)

with, retains and employs the Party of the Second Part as attorney in the matters hereinafter mentioned, subject to the approval of the Commissioner of Indian Affairs, and the Secretary of the Interior, pursuant to Section 2103 of the Revised Statutes of the United States of America.

It shall be the duty of said attorney to advise and represent the said Lee Arenas in connection with properly investigating and formulating any claim, or claims, either in law or in equity, that he may have by virtue of being a member of said Tribe as aforesaid, and by reason of the fact that he by inheritance has certain claims to certain properties hereinafter set forth, by virtue of the so-called Allotment Act of the Agua Caliente Band of Mission Indians residing in or about the vicinity of Palm Springs, in the County of Riverside, in the State of California, and in the United States of America, which said Act is known and designated as the Act of Congress of February 8, 1887 (24 Stat. L. 388) as amended by the Act of June 25, 1910 (36 Stat. L. 855), and Supplemented by the Act of March 2nd, 1917 (39 Stat. L. 969-76) which said Act provided among other things for the selection of allotments to Indians of the United States of America, and especially pertaining to the allotment selections of the said Agua Caliente (Palm Springs) Indian Reservation Tribe of Indians in California; and that said allotments or selections are hereinafter set forth, as follows, to-wit:

Lot No. 46, Section 14, Twp. 4 S., Range 4

Petitioners' Exhibit No. 6—(Continued)

East, S.B.B. & M., Riverside County, State of California, containing two (2) acres;

Tract No. 39, Section 26, Twp. 4 South, Range 4 East, S.B.B. & M., Riverside County, State of California, containing five (5) acres;

The East $\frac{1}{2}$ of SW $\frac{1}{4}$ of NW $\frac{1}{4}$ and SE $\frac{1}{4}$ of NW $\frac{1}{4}$ of NW $\frac{1}{4}$ and SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of NW $\frac{1}{4}$, Section 26, Twp. 4 South, Range 4 East, S.B.B. & M., Riverside County, State of California, containing forty (40) acres;

Lot 28, Sec. 14, Twp. 4 S., Range 4 E., S.B.B. & M., Riverside County, State of California, containing two (2) acres;

Tract No. 42, Sec. 26, Twp. 4 South, Range 4 E., S.B.B. & M., Riverside County, State of California, containing five (5) acres;

SW $\frac{1}{4}$ of SW $\frac{1}{4}$, Sec. 26, Twp. 4 South, Range 4 East, S.B.B. & M., Riverside County, State of California, containing forty (40) acres;

Lot 47, Sec. 14, Twp. 4 South, Range 4 E., S.B.B. & M., Riverside County, State of California, containing two (2) acres;

Tract No. 40, Sec. 26, Twp. 4 S., Range 4 E., S.B.B. & M., Riverside County, State of California, containing five (5) acres;

SE $\frac{1}{4}$ of NW $\frac{1}{4}$, Sec. 26, Twp. 4 South, Range 4 East, S. B. B. & M., Riverside County, State of California, containing forty (40) acres;

Lot 43, Sec. 14, Twp. 4 South, Range 4 East,

Petitioners' Exhibit No. 6—(Continued)

S. B. B. & M., Riverside County, State of California, containing two (2) acres;

Tract 37, Sec. 2, Twp. 5 South, Range 4 E., S. B. B. & M., Riverside County, State of California, containing five (5) acres;

SE $\frac{1}{4}$ of SW $\frac{1}{4}$, Sec. 26, Twp. 4 S., Range 4 E., S. B. B. & M., Riverside County, State of California, containing forty (40) acres,

which said allotments were certified on or about the 21st day of June, 1923, by H. L. Wadsworth, Special Allotting Agent.

It shall be the duty of said attorney to advise the said Party of the First Part, and to represent him before all courts, departments, tribunals, and other officers and commissions having any duty to perform in connection with the investigation, consideration, or final settlement of his said claims, and any and all matters that may be necessary in the opinion of the said attorney at law, Party of the Second Part, and in the final settlement of any and all claims and matters pertaining to said allotment to said Party of the First Part, or to any of the ancestors of the said Party of the First Part, and any relative either by law or by marriage that might become the property of the said Party of the First Part by inheritance, or otherwise.

That said Party of the Second Part, attorney at law as aforesaid, in the performance of his duties as required of him under this contract, shall be subject to the reasonable supervision and direction of the Commissioner of Indian Affairs, and the Secre-

Petitioners' Exhibit No. 6—(Continued)

tary of the Interior, and the said attorney at law shall not make any compromise, settlement or other adjustment of the matters in controversy unless with the approval of either or both of said officers; and it is also understood and agreed that the said attorney at law, and his associates if any, shall pursue the litigation in question to and through the Court of final resort, unless authorized by the Secretary of the Interior to terminate the proceedings at an intermediate stage thereof;

It Is Agreed that the said attorney is hereby authorized to associate with him in said work hereunder such assistants, including attorneys, as he may select, provided that the Government of the United States shall not be liable for any expenses; however, it is understood and agreed by the said Party of the First Part that he is to advance from time to time to said attorney such reasonable and necessary expenses which said Party of the Second Part, or his associates, may deem necessary for the proper conduct of any litigation or appearances before any Commission or body of the United States to further said litigation or compromise thereof for the benefit of the said Party of the First Part, which said expenses which may be advanced are to be borne by the said Party of the First Part; however, the Party of the Second Part is to furnish proper vouchers for each and every item of expense that may be incurred.

It Is Further Understood that in consideration of the services to be rendered under the terms of this

Petitioners' Exhibit No. 6—(Continued)

contract, the Party of the Second Part shall receive an aggregate fee of ten per centum (10%) of the amount of the reasonable value of the property hereinabove set forth, or such part thereof as the Party of the First Part may become entitled to by reason of said litigation or proceedings. Said ten per centum compensation shall be upon the basis of the reasonable market value of the said property as of the date of the completion of said litigation, but in no event shall be less than the value as of the date of the signing of this agreement.

It Is Further Understood that in event the Party of the Second Part, or his associates who are actually associated in the litigation and investigation as aforesaid, shall advance any necessary expenses, they shall be reimbursed by the Party of the First Part, from the property recovered, such actual expenses as are strictly necessary or proper in connection with the printing of briefs, court costs for proceedings and other similar matters, and to include such actual and necessary traveling expenses, clerical hire, stenographic expense, and the like as may be properly required for the prosecution of said case, or cases; provided that all such expenditures shall be itemized and verified by the Party of the Second Part, and shall be accompanied by proper vouchers, and shall be paid only upon the approval of the Secretary of the Interior, or an officer designated by him who shall certify the same.

It Is Further Understood and Agreed by and between the parties to this Agreement, that in event

Petitioners' Exhibit No. 6—(Continued)

of a misunderstanding as regards the manner in which the compensation to the Party of the Second Part from the Party of the First Part shall be paid; and Trust Patents or receipts have been issued, and in that event the Party of the First Part shall thereupon make application for a removal of restrictions upon sufficient of the premises to be sold, and from the proceeds of said sale or sales to pay said Party of the Second Part; that in event it is not for the best interests of the parties hereto to sell said land, the removal of restrictions shall be applied for upon properties coming to the First Party, as selected by said Second Party, upon the basis of one-tenth of the property—that is to say, Second Party shall select one property that does not exceed ten per cent. of the total value of all properties, and that First Party shall select nine properties that do not exceed ninety per cent. of the total value of said properties, and continue to make such selections until all property shall have been selected. That the property selected by the Second Party shall then be deeded to said Second Party, subject to the approval of the Secretary of the Interior and the Commissioner of Indian Affairs.

It Is Further Agreed that this contract shall continue for a period of five (5) years beginning with the date of the signing thereof, or until the completion of said litigation.

And it is further understood and agreed that no assignment of this contract, or any interest therein, shall be made without the consent previously ob-

Petitioners' Exhibit No. 6—(Continued)

tained from the Commissioner of Indian Affairs, and the Secretary of the Interior, and that such assignment if made must comply with Section 2106 of the Revised Statutes of the United States.

This contract shall run to and be binding upon the heirs, executors, administrators, and assigns of the parties hereto.

In Witness Whereof we have hereunto set our hands and seals this 20th day of November, 1940, in the City of Los Angeles, State of California.

/s/ LEE ARENAS

Party of the First Part

/s/ DAVID D. SALLEE

Atty., Party of the Second Part.

Department of the Interior

Office of Indian Affairs

....., 19 .

The foregoing contract is hereby approved in accordance with the provisions of section 2103 of the United States Revised Statutes.

.....
Commissioner

Department of the Interior

Office of the Secretary

....., 19 .

The foregoing contract is hereby approved in accordance with the provisions of Section 2103 of the United States Revised Statutes.

.....
Secretary

Petitioners' Exhibit No. 6—(Continued)

I, Paul J. McCormick, a Judge of the District Court for the Southern District of California, a Court of Record, do hereby certify, pursuant to Section 2103 of the Revised Statutes of the United States, that David D. Sallee, Attorney at Law, of Los Angeles, California, Party of the second part to the above written and hereto attached contract, in his own proper person and in my presence at Los Angeles, on the 20th day of November, 1940, entered into, signed and executed in quadruplicate the said contract above written and hereto attached, and that he executed the same in his own behalf and of his own free act and deed; and that as then stated to me that said Lee Arenas of the Agua Caliente Tribe of Indians is the party interested on the one side, and that the said attorney at law of Los Angeles is the party interested on the other.

In Witness Whereof, I have hereunto signed my name as Judge of the said Court.

[Seal] /s/ PAUL J. McCORMICK
(Judge)

District Court of the Southern District,
Of the State of California—ss.

I, R. A. Zimmerman, Clerk of the Court in said District, do hereby certify that Hon. Paul J. McCormick, whose genuine signature is subscribed to the annexed writing, was, at the time of signing the same, Judge of said Court, duly commissioned and qualified.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the said Court at the City

Petitioners' Exhibit No. 6—(Continued)

ing the same, Judge of said Court, duly commissioned and qualified.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the said Court at the City of Los Angeles on the 20 day of November, 1940.

(Seal of the District Court.)

/s/ R. A. ZIMMERMAN,
Clerk of the District Court for The Southern District of the State of California.

[Stamped]: Received Jan. 14, 1941. 2520. Office of Indian Affairs.

Admitted in evidence 2/10/48.

PETITIONERS' EXHIBIT No. 6-A

Department of the Interior
Office of Indian Affairs

Washington, February 6, 1948

I, James W. Hutchison, Acting Commissioner of Indian Affairs, do hereby certify that the paper hereunto attached is a true copy of the original as the same appears of record in this Office.

In Testimony Whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed on the day and year first above written.

[Seal] /s/ J. W. HUTCHISON,
Acting Commissioner.

Petitioners' Exhibit No. 6-A—(Continued)

Land Division

Claims—50045-42—4843-41—J T R

[Stamped]: Jun 3 1943

Chicago, Illinois

David D. Sallee, Esq.,

Attorney at Law,

806 Garfield Bldg., Los Angeles, Calif.

My dear Mr. Sallee:

The attorneys' contract between you and Lee Arenas of the Palm Springs Indian Reservation, California, has not heretofore received administrative sanction for reasons which may be briefly outlined thus:

(1) Sections 2103-2106 of the Revised Statutes (now Sections 81-84, Title 25 U.S.C.) pursuant to which the purported contract is drawn are inapplicable to contracts between individual Indians and attorneys employed by them in their individual capacity. Rather the sections mentioned deal primarily with tribal contracts affecting tribal matters and pursuant to which attorneys retained by an Indian tribe, under proper authorization from the tribal authorities, must have such contracts executed before a judge of a court of record. Contracts with individual Indians require no such formality. See the Act of June 30, 1913 (38 Stat. 97; Title 25 U.S.C. Section 85).

(2) The manifest purpose of the contract between you and Mr. Arenas is to compel recognition by the United States Government, including the Secretary of the Interior and the Commissioner of Indian Affairs, of the alleged right of Lee Arenas and

Petitioners' Exhibit No. 6-A—(Continued)

other members of his family to the allotment of certain lands within the Palm Springs Indian Reservation, described in detail on pages 2 and 3 of the contract at hand. As we view it, the legal right of the Indians at Palm Springs Indian Reservation to compel recognition of their claim to right of allotment in severalty has previously been adjudicated by the courts and decided against the contention of these Indians: See the case of Genevieve P. St. Marie, et al vs. United States (24 Fed. Sup. 237; affirmed 108 Fed. 2d 876; certiorari denied by the Supreme Court on October 14, 1940). The legal issues involved having thus been definitely determined and disposed of by the courts, it is not seen wherein any good purpose would now be served by encouraging other individual members of this band to indulge in fruitless and apparently hopeless litigation. This does not mean to imply of course that this office would decline to consider or approve a proper contract under appropriate circumstances, if correctly drawn and executed.

(3) As to the contract at hand, ordinarily we do not favorably consider such contracts between Indians and their attorneys, involving civil actions at least, unless the fee or compensation to be allowed the attorneys for services rendered is on what we term a combination "contingent fee and quantum meruit basis". That is, and briefly, no recovery, no fee and in the event of recovery the fee allowed is to be determined on a quantum meruit basis by the Commissioner of Indian Affairs or the Secretary of

Petitioners' Exhibit No. 6-A—(Continued)
the Interior. Pages 5, 6, and 7 of the contract between you and Mr. Arenas imply that your fee and necessary expenses are to be paid "from the property recovered", but as to the fee itself (page 5) that is fixed at 10 per cent of the amount of the reasonable value of certain property previously described in the contract. That description covers four town lots of two acres each in Section 14; four tracts of five acres each and four tracts of 40 acres each in Section 26, Township 4 South, Range 4 East.

While a fee of 10 per cent in itself is ordinarily not regarded as excessive yet we do know that much of the property at Palm Springs is quite valuable, particularly the town lots in Section 14 and hence we would not feel disposed to consider favorably a contract contemplating a flat fee even of 10 per cent where the property rights involved may run into high figures.

These are but additional comments or suggestions as to the form and substance of the contract at hand, but in view of the fundamental objection under number 2 above, possibly any further comment at this time would be superfluous.

In connection with the subject matter generally; i.e., contracts between individual Indians and attorneys employed by them, you appreciate that the Indians as citizens have the same right as other citizens to negotiate valid and binding contracts with third parties, including attorneys, without approval by this Office or the Department provided the ob-

Petitioners' Exhibit No. 6-A—(Continued)

ligations incurred or to be incurred under such contracts do not affect tribal or other property rights subject to control or supervision by this Department. In other words, unless payment for services rendered is to be had out of restricted funds or other assets belonging to the Indians, approval of such contracts by this Department is not required, as a matter of law.

Sincerely yours,

[Seal] /s/ WALTER V. WOEHKE,
Assistant to the Commissioner.

MLM—5-MS-29

cc to Mission Agency

Admitted in evidence 2/10/48.

PETITIONERS' EXHIBIT No. 7

POWER OF ATTORNEY AND CONTRACT

Know All Men By These Presents: That I, Lee Arenas, an enrolled Indian and member of the Palm Springs, or Agua Caliente, Indian Reservation, Riverside County, and State of California, have constituted, appointed and made, and by these presents do make, constitute and appoint David D. Sallee, John W. Presten and Oliver O. Clark, Esq., of Los Angeles, California, my true and lawful Attorneys, for me and in my name, place and stead to do all things lawful, proper and right in my behalf as a member of said tribe and reservation, and particularly to look after and protect my rights, and the rights of the members of my family, in respect

to all rights, including our allotments which I have selected as the head of the family for myself and my children, and to protect us in the use and occupancy of the same and doing all things necessary in our behalf. That full power and authority is hereby granted to David D. Sallee, John W. Presten and Oliver O. Clark, to appear before any and all the Departments of the United States in my behalf, or any of the Courts to which it may be necessary to apply; and to also defend out interests in any Courts or tribunals. I hereby agreeing to pay my said Attorneys upon a quantum meruit basis for services rendered, and to advance or reimburse any and all expenses incurred in my behalf or in behalf of any and all members of my family. All to be subject to the rules and regulations of the Department of the Interior.

I, Hereby Giving and Granting To My Said Attorneys full power of substitution and assistance to perform every act and transaction necessary to be done in our behalf the same as I might or could do if personally present; I hereby ratifying and confirming all that my said Attorneys, assistants or substitutes may lawfully do, or cause to be done in our behalf. This contract is irrevocable except upon proper, fair and just termination of the same, particularly payment of costs, expenses and fees earned.

In Witness Whereof I have hereunto set my hand this 1st day of February, A.D. 1945.

/s/ LEE ARENAS

The State of California,
County of Riverside—ss.

Be it known that on this 1st day of February, 1945, before me, the undersigned Notary Public in and for said County and State, personally appeared the above named maker of this contract and power of attorney, and to me known to be the identical person, and who acknowledged the execution thereof to be his free act and deed for the purposes in said above contract and power of attorney set forth.

In Witness Whereof I have hereunto set my hand and affixed my notarial seal the day and year in the above certificate set forth.

[Seal] /s/ BENTON BECKLEY,
Notary Public in and for the County of Riverside,
State of California.

My Commission expires June 9, 1947.

Admitted in evidence 2/10/48.

PETITIONERS' EXHIBIT No. 8

POWER OF ATTORNEY AND CONTRACT

Know All Men By These Presents: That I, Marian Therese Arenas, an enrolled Indian and member of the Palm Springs, or Agua Caliente, Indian Reservation, Riverside County, and State of California, have constituted, appointed and made, and by these presents do make, constitute and appoint David D. Sallee, John W. Presten and Oliver O. Clark, Esq., of Los Angeles, California, my true

and lawful Attorneys, for me and in my name, place and stead to do all things lawful, proper and right in my behalf as a member of said tribe and reservation, and particularly to look after and protect my rights, and the rights of the members of my family, in respect to all rights, including our allotments which I have selected as the head of the family for myself and my children, and to protect us in the use and occupancy of the same and doing all things necessary in our behalf. That full power and authority is hereby granted to David D. Sallee, John W. Preston and Oliver O. Clark, to appear before any and all the Departments of the United States in my behalf, or any of the Courts to which it may be necessary to apply; and to also defend our interests in any Courts or tribunals. I hereby agreeing to pay my said Attorneys upon a quantum meruit basis for services rendered, and to advance or reimburse any and all expenses incurred in my behalf or in behalf of any and all members of my family. All to be subject to the rules and regulations of the Department of the Interior.

I, Hereby Giving and Granting To My Said Attorneys full power of substitution and assistance to perform every act and transaction necessary to be done in our behalf the same as I might or could do if personally present; I hereby ratifying and confirming all that my said Attorneys, assistants or substitutes may lawfully do, or cause to be done in our behalf. This contract is irrevocable except upon proper, fair and just termination of the same, particularly payment of costs, expenses and fees earned.

In Witness Whereof I have hereunto set my hand
this 1st day of February, A.D. 1945.

/s/ MARIAN THERESE ARENAS

The State of California,
County of Riverside—ss.

Be it known that on this 1st day of February,
1945, before me, the undersigned Notary Public in
and for said County and State, personally appeared
the above named maker of this contract and power
of attorney, and to me known to be the identical per-
son, and who acknowledged the execution thereof to
be his free act and deed for the purposes in said
above contract and power of attorney set forth.

In Witness Whereof I have hereunto set my hand
and affixed my notarial seal the day and year in the
above certificate set forth.

[Seal] /s/ BENTON BECKLEY,
Notary Public in and for the County of Riverside,
State of California.

My Commission expires June 9, 1947.

Admitted in evidence 2/10/48.

T. 4 S. R. 4 E. Sec. 14
1 inch = 4.00 chs. or 264 ft



Sec. 15
Spring St
Street
Town site
St
Main
Springs
LINE St
Pa/m

Al. 51. 2 ✓	Al. 51. 1 ✓
Al. 51. 3 ✓	Al. 51. 4 ✓
Al. 51. 14 ✓	Al. 51. 13 ✓
Al. 19 ✓ 15	
Al. 6 ✓ 22	
Al. 7 ✓ 23	
Al. 12 ✓ 26	

Al. 10. 5 ✓	Al. 78 6 ✓
Al. 11. 12 ✓	Al. 79 11 ✓
Al. 30 ✓ 16	
Al. 31 ✓ 21	
Al. 32 ✓ 24	
Al. 33 ✓ 25	

Al. 14 7 ✓	8
Al. 15 10 ✓	9
Al. 24 ✓ 17	Al. 26 18 ✓
Al. 35 20 ✓	Al. 27 19 ✓

Al. 13 ✓ 27
Al. 9 ✓ 44
Al. 42 ✓ 45
Al. 41 ✓ 48
Al. 45 ✓ 49
Al. 44 ✓ 52

Al. 1 28 ✓
Al. 5 ✓ 113
Al. 2 ✓ 46 ✓
Al. 3 ✓ 47 ✓
Al. 4 ✓ 50
Al. 8 ✓ 51

Al. 16 53 ✓
Al. 17 ✓ 60
Al. 18 61 ✓

Al. 40 ✓ 54
Al. 21 ✓ 59
Al. 22 ✓ 62

Al. 54 ✓ 29	Al. 24 ✓ 30	Al. 23 ✓ 31	Al. 25 ✓ 32	Al. 27 ✓ 33	Al. 46 ✓ 34	Al. 47 ✓ 35
42	41	Al. 25 ✓ 40	39	Al. 50 ✓ 38	Al. 49 ✓ 37	Al. 48 ✓ 36

Al. 43 ✓ 55	Al. 38 56	Al. 34 57	58
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Corratory
Tr #43
4 Acres
500

Sec. 14, T. 4 S., R. 4 E.
1 inch = 4.00 chs. or 264 ft.

Case No. 13210¹⁸
Date
Date
Clerk
Deputy

for school

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10040

Case No. 13210'E.

Grenar

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18

EXPIRATION

Date

Date 2/20/48

Clerk, ly

Lawrence

PETITIONERS' EXHIBIT No. 20

In the District Court of the United States, Southern
District of California, Central Division

No. 1321—O'C—Civil

LEE ARENAS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Under the powers of attorney granted by the group of Indians at Palm Springs to John W. Preston, Oliver O. Clark and David D. Sallee, complaints were prepared in 1945, but not filed, for the following:

Lena Jessica Lugo Welmas, Florida Patencio, John J. Patencio, Albert Patencio, Matilda Patencio Welmas Saubel, Nicholosa Sol, Frank Segundo, Clemente Segundo, Willie Marcus Belardo.

On April 24, 1945, the following actions were filed:

No. 4401, Carrie Pierce Casero; No. 4402, Laverne Miguel Milanovich; No. 4403, Lucy Pete; No. 4404, Annie Pierce; No. 4405, Ramalda Taylor.

On February 9, 1945, the following actions were filed:

No. 4235, Viola Hatchitt; No. 4236, Juana Hatchitt.

PETITIONERS' EXHIBIT No. 20

In the District Court of the United States, Southern
District of California, Central Division

No. 1321—O'C—Civil

LEE ARENAS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Under the powers of attorney granted by the group of Indians at Palm Springs to John W. Preston, Oliver O. Clark and David D. Sallee, complaints were prepared in 1945, but not filed, for the following:

Lena Jessica Lugo Welmas, Florida Patencio, John J. Patencio, Albert Patencio, Matilda Patencio Welmas Saubel, Nicholosa Sol, Frank Segundo, Clemente Segundo, Willie Marcus Belardo.

On April 24, 1945, the following actions were filed:

No. 4401, Carrie Pierce Casero; No. 4402, Laverne Miguel Milanovich; No. 4403, Lucy Pete; No. 4404, Annie Pierce; No. 4405, Ramalda Taylor.

On February 9, 1945, the following actions were filed:

No. 4235, Viola Hatchitt; No. 4236, Juana Hatchitt.

On January 9, 1947, action No. 6221-PH in re Eleuteria Brown Arenas was filed, and is now pending.

On February 16, 1948, an action was filed in the District Court of the United States for the District of Columbia, against Julius A. Krug, Secretary of the Interior of the United States, on behalf of the following named Palm Springs Indians:

Ramalda Lugo, aka Ramalda Lugo Taylor, Carrie Pierce Casero, Annie Pierce, Juana Saturnino Hatchitt, Viola Juanita Hatchitt, Lena Jessica Lugo, aka Lorene L. Welmas, LaVerne Milanovich, aka LaVerne Virginia Miguel, Elizabeth Pete, Anthony (Andreas) Joseph, Joe Patentio, aka John J. Patentio, Florida Patentio, aka Flora Patentio, Santo Albert Patentio, Clemente Segundo, aka C. P. Segundo, Francis Segundo, aka Francisco Segundo, Matilda Patentio, aka Matilda T. Saubel.

Admitted in evidence 3/8/48.

[Endorsed]: Filed Mar. 8, 1948.

RESPONDENTS' EXHIBIT "D"

[Letterhead of David D. Sallee]

November 7, 1944

Mr. and Mrs. Lee Arenas,
Palm Springs, California

Dear Mr. and Mrs. Arenas:

Marion you were going to send me some money last Friday. You did not do it. However, I under-

stand you went to Pala and I am very sorry to hear that Vivian Bank's mother passed on. I am writing her today.

We were notified this morning by the United States Attorney's office that we would have to get our answers in on those various suits that were filed against you individual Indians. These will have to be in not later than the 27th and I am going to have to have some costs for each one. Also, you were going to send some costs to pay Wadsworth's expenses from San Diego up here and his hotel bill while here. I think it will be at least \$25.00 we will have to pay for expenses of Mr. Wadsworth. So you get me as you promised, at least \$50.00 in here by return mail.

Yours truly,

/s/ DAVID D. SALLEE

DDS:Y

Admitted in evidence 2/20/48.

RESPONDENTS' EXHIBIT "F"

In the District Court of the United States In and
For the Southern District of California
Central Division

No. 1321-O'C Civil

LEE ARENAS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

TESTIMONY OF DONALD C. JONES AS TO
HIS QUALIFICATIONS AS AN EXPERT
REAL ESTATE APPRAISER.

Pursuant to the Order of this Court made on Friday, February 13, 1948, the following testimony of Donald C. Jones as to his general and special qualifications as an expert real estate appraiser is hereinafter set forth in question and answer form and subscribed to by said witness:

Q. Where do you reside, Mr. Jones?

A. I reside in Fullerton, Orange County, California.

Q. What is your occupation?

A. Realtor and appraiser.

Q. Are you a licensed real estate broker?

A. Yes; I have a license as a real estate broker in the State of California since 1927.

Q. Have you been active in buying and selling properties on your own account and as a broker for clients?

Respondents' Exhibit "F"—(Continued)

A. Yes, I have.

Q. What types of properties?

A. I specialize particularly in agricultural properties. However, I have bought and sold on my own account income properties, residential subdivision properties, as well as citrus groves and agricultural property, and have also handled all kinds of real estate as a broker.

Q. How old are you, Mr. Jones?

A. 51.

Q. What has been your education?

A. I graduated from the University of California at Berkeley in 1921 with a BA degree, attended the University of Wisconsin for three years prior to World War I. I completed my education after World War I at the University of California.

Q. Subsequent to that and prior to your engagement as a real estate broker, what was your activity?

A. Prior to entering the real estate profession I had some experience as a ranch foreman on a citrus grove in Orange County, from 1921 to 1924. Then I operated properties of my own, citrus groves, ranch properties, and income properties in Orange County, Riverside County, San Diego County, and Los Angeles County.

Q. In connection with real estate activities, have you held any position in either local or other real estate boards or associations?

A. Yes. I have been a member of the Fullerton Realty Board since 1927; past President of the

Respondents' Exhibit "F"—(Continued)

Fullerton District Board of Realtors, two terms. I am a member of the California Real Estate Association, the National Association of Real Estate Boards, the Institute of Farm Brokers, America Right of Way Association, and of the American Institute of Real Estate Appraisers.

Q. In connection with your activity as a real estate broker and as an operator buying and selling real estate of various kinds throughout Southern California, have you had occasion to make appraisals?

A. Yes I have.

Q. What kinds of properties have you appraised?

A. I have appraised practically all types of real property, Mr. Brett, continuously since 1928 in various capacities.

Q. In that connection have you made appraisals for others, and particularly for the purpose of determining the fair market value of these properties?

A. Yes. I have been employed by private individuals, corporations, and public bodies, both state and federal, as an appraiser of the fair market value of real estate.

Q. Have you testified in court?

A. Yes. I have testified in the Superior Courts of Los Angeles County, Orange County, Ventura County, San Diego County, and Riverside County, and have testified on the market value and damages to real properties in the federal courts of the Southern District of California.

Respondents' Exhibit "F"—(Continued)

Q. Have you had previous employment by the United States Government in the capacity of real estate appraiser?

A. Yes.

Q. For what agencies of the federal government?

A. For the United States Army Engineers, United States Navy, and Lands Division of the Department of Justice.

Q. Will you briefly indicate the scope of those particular appraisals, what properties they covered, and their locations?

A. I was employed as an appraiser for the U. S. Engineers in 1939 in the appraisal of some eight thousand acres of land involving Prado Dam, on the Santa Ana River.

Q. Where is that located?

A. The properties affected by this taking were located in Riverside and San Bernardino Counties. And I appraised properties for the United States Navy, scattered generally throughout Southern California, which were being acquired by the Government for War Purposes, such as airports, airport expansions, and bombing ranges—the various types of property being taken during the War. The same is true of the Lands Division, Department of Justice, taking property by condemnation proceedings or otherwise, for War purposes, scattered throughout Southern California. I was also employed by the Lands Division, Department of Justice, in the appraisal of some eight or ten thousand acres of

Respondents' Exhibit "F"—(Continued)
land in the Central Valley Project in the San Joaquin Valley, which was the subject of litigation under the Tucker Act in which I was a witness on the value and depreciation of value of certain lands affected by the Central Valley Project.

Q. In what counties?

A. The properties which were the subject of this litigation were in Merced and Madera Counties.

Q. Now, in your varied activities as a real estate appraiser since 1928, have you been employed by the State of California or any of its agencies?

A. Yes.

Q. State what agencies you have been employed by and the general character of the properties and their location.

A. I have been employed by the State Division of Highways for the appraisal of rights of way for highway and freeway acquisitions located in Riverside, Orange, and Los Angeles Counties. I am presently employed by the Division of Beaches and Parks in the appraisal of properties at Newport Beach which are the subject of a program to install a State Beach Park in connection with the City of Newport Beach. I am employed at the present time by the Department of Finance of the State of California to appraise properties located in San Bernardino County being acquired for the expansion of Patton Hospital.

Q. Have you been employed by any of the Counties of the State in the southern area?

A. Yes, by the Board of Supervisors of Orange

Respondents' Exhibit "F"—(Continued)

County, Orange County Flood Control District, by the Riverside County Counsel, by the Los Angeles County Counsel.

Q. Have you been employed by any of the cities in this southern area?

A. Yes, by the City of Los Angeles, through the City Attorney, in the appraisal of property at Playa del Rey for the establishment of a beach park, and by the City of Santa Ana in the appraisal of widening the streets in that city.

Q. Have you been employed by any school districts?

A. Yes, by the Buena Park School District of Orange County in the appraisal of some acreage being acquired for the expansion of the Buena Park School, and by the La Habra School District in a similar capacity in the appraisal being acquired for the expansion of the school.

Q. Have you been employed by any water districts or irrigation districts?

A. Yes, I was employed by the Santa Ana Valley Irrigation Company, a mutual water company, to appraise all of the properties in their ownership in Orange, Riverside, and San Bernardino Counties, all of the real properties which are held generally with the Anaheim Union Water Company.

Q. Have you been employed by the Metropolitan Water District?

A. Yes, I was appraiser for the Metropolitan Water District of Southern California from 1932 until the completion of the Colorado River Aque-

Respondents' Exhibit "F"—(Continued)

duct and its appurtenant works. I was employed in 1932 and was designated appraiser in 1935, and my employment by the Metropolitan Water District was on a per diem contract basis so that I had time for other employment during the period from 1932 to 1942.

Q. Are there any other public bodies for whom you have done appraisal work?

A. I was appraiser for the Federal Reserve Bank of Los Angeles during the time of the Japanese eviction, temporary employment. And I was appraiser for the Federal Intermediate Credit Bank in 1934 or 1935, for the appraisal of some 2500 acres of citrus property in Orange County for the purpose of granting a loan; appraiser for the Federal Land Bank at Berkeley in 1933 and 34, in the appraisal of agricultural properties in Riverside, San Bernardino, and Orange Counties. I was employed by numerous semi-public organizations, but do not recall any other definite public agencies.

Q. Have you appraised for the Federal Works Agency?

A. Yes, the properties being taken in the City of Los Angeles for War purposes in 1944 I believe—hotel and apartment house properties.

Q. Has your employment been exclusively for public bodies or agencies, for either the Government or the State?

A. No. I would say that during the war years, perhaps 85 or 90 per cent of my appraisal experience has been for government agencies; otherwise,

Respondents' Exhibit "F"—(Continued)

50% or more has been for private individuals or private corporations.

Q. Have you been employed by the Title Insurance and Trust Company of Los Angeles?

A. Yes.

Q. In what capacity?

A. To appraise five thousand acres of vineyard property located near Ontario for the Estate of Louisa Guasti.

Q. Have you appraised for any large ranch companies?

A. Yes I have, several of them.

Q. What ones?

A. The Irvine Ranch Company of Orange County; the Moulton Ranch Company, owners of a 22,000-acre cattle ranch in Orange County; for the Bastanchury Ranch Company of Orange County, owners of some 3,000 acres of citrus properties in Orange County; for the Azusa Foothill Citrus Company, owners of 600 acres of citrus properties near the City of Azusa.

Q. Have you appraised for any railroads?

A. Yes, for the Union Pacific Railroad Company—was a witness on the market value of real property along the line of the Union Pacific Railroad through Whittier, La Habra and Fullerton.

Q. We have several times discussed the fact that you have been appraising lands and determining and fixing your opinion as to its fair market value. Has that work included fixing the value of fee simple and of lesser interests in real property?

Respondents' Exhibit "F"—(Continued)

A. Yes.

Q. You have already testified that you have appraised rights of way?

A. Yes, a great deal of them.

Q. What rights? Water rights?

A. Yes.

Q. Depreciation arising out of takings which we call severance damage?

A. Yes.

Q. Have you also made appraisals of fair market value for purposes other than condemnation?

A. Yes, many times.

Q. Have you made such appraisals, for example, to assist in fixing the value of units of land as a basis for partition?

A. Yes, particularly in the Moulton Ranch appraisal. The purpose of the appraisal was for the division of undivided interests in the property.

Q. Have you made such appraisal for the purpose of determining the amount of damage ensuing from flood waters or from alleged misuse of lands?

A. Yes, I have been a witness on the alleged damage to properties occasioned by floods on several occasions.

Q. And in that respect gave your opinion of fair market value before and after the alleged damage?

A. Yes.

Q. In addition to your practical experience which you have just outlined, have you engaged in any specific educational activities to aid you and

Respondents' Exhibit "F"—(Continued)

to add to your practical knowledge of the science of appraising?

A. Yes, I have.

Q. What have you done in that respect?

A. I have taken a course from the University of Southern California in the appraisal of real estate in 1929, or 1930 I believe it was, and I have continuously, since entering the appraisal profession, studied the works and pamphlets and courses offered by various organizations, particularly that offered by the American Institute of Real Estate Appraisers.

Q. Is that organization a privately-owned business under a fictitious name, or is it an organization having an active membership throughout the country?

A. It has an active membership throughout the country, and is a division of the National Association of Real Estates Boards. I mean by that it is organized under their jurisdiction. However, it is a separate entity to itself, and members are composed of qualified appraisers throughout the United States.

Q. Can anyone join, or is such party required to exhibit certain qualifications before he is admitted?

A. To become a member of the American Real Estate Appraisers one must have at least eight years experience as an appraiser; must submit copies of his appraisal work to the Commission's committee; must take a written examination prepared by the examining committee in our Chicago

Respondents' Exhibit "F"—(Continued)
office; and must pass an oral examination by an Admission Committee of the local chapter with which he desires to affiliate.

Q. Does such organization have any official publications?

A. Yes, it has a national magazine known as the Appraisal Journal, which is a quarterly magazine, published four times yearly. It has numerous bulletins and appraisal case study courses which it offers to its members and to the public at large.

Q. With specific reference to the City of Palm Springs and its environs, when did you, as an appraiser, become familiar with the value of real estate in that area?

A. In 1928 or 1929.

Q. And in what capacity were you engaged in becoming familiar with that area?

A. I was engaged as a real estate broker, in negotiating an exchange of citrus properties in Orange County for residential income property and vacant land in Palm Springs.

Q. Did that employment include any personal inspection of the premises and investigation of surrounding properties and of conditions existing at that time in real estate values?

A. Yes. I had a client who wanted to exchange some Orange County citrus property for business income property in Palm Springs, and I was trying to find a property that would suit him as well as trying to find a Palm Springs property owner who

Respondents' Exhibit "F"—(Continued)

would be interested in Orange County citrus property.

Q. Will you briefly indicate what the scope of your investigation was at that time?

A. I investigated the sales and listings of business income properties and vacant lots in Palm Springs adapted to business income developments, and became familiar with the community as a whole.

Q. Following that, did you have any further activity in the Palm Springs area in the course of your chosen work as a real estate broker and as an appraiser prior to the time that you were employed by the United States in this particular case?

A. Yes.

Q. What was your next employment which included appraisal work and which had direct application to the Palm Springs area?

A. In 1938 I was employed by Pearl McManus and her attorney E. Heber Winder, of Riverside, to appraise approximately 500 acres of land in Section 19 and Section 29 lying just easterly of the City of Palm Springs which were the subject of litigation with the Smoke Tree Ranch over flood damages. I was a witness on the market value of the property affected and the damages thereto.

Q. In respect to that employment, will you briefly indicate what the scope of your investigation and activities were?

A. In connection with my forming an opinion of the market value of this property before and after the flood damage, I made an intensive survey of the

Respondents' Exhibit "F"—(Continued)
real estate market at Palm Springs and vicinity, and I personally inspected practically all of the vacant acreage as well as the lands being offered for subdivision in the vicinity, getting the information regarding the selling price of the lands and the asking price of lands then offered for sale, particularly on the Smoke Tree Ranch in Section 23 and the lands lying just easterly of the main developed community of Palm Springs.

Q. Did that include lands which are similar in character to those involved in this particular case?

A. Yes, the properties in that litigation would be comparable in many respects to the lands in Section 26 involved in this case.

Q. Now, following that employment, did you make any other investigations and appraisals in the Palm Springs area prior to your employment in this particular case?

A. Yes, in 1943 I was employed by the U. S. Army Engineers to appraise lands in Section 13 being taken by the Government for the Palm Springs Army Airport. Some three or four hundred acres of desert lands, some improved and some unimproved, were appraised by me at that time, and in 1944 I was employed by the Lands Division of the Department of Justice for the appraisal of properties being taken for the expansion of this airport, leasehold interests being taken for use as a part of the airport, and all lands in Section 11, improved properties, being taken for the expansion of Torney General Hospital, formerly Hotel El Mira-

Respondents' Exhibit "F"—(Continued)

dor. I was also employed by the Lands Division of the Department of Justice in 1944 or 1945 for the appraisal of a Sewage Disposal Plant site located in Section 19, and for rights of way for roads and pipe lines as a part of the Torney General Hospital and the Palm Springs Army Airport.

Q. Mr. Jones, in each of these appraisal assignments did you make a detailed study of the then existing real estate market in Palm Springs and vicinity?

A. Yes, the appraisal assignments required a detailed study of the real estate market in Palm Springs and vicinity.

Q. Did you, as a part of those assignments, make an investigation of sales and listings on all types of developed and undeveloped acreage of residential and business properties?

A. Yes.

Q. Did you obtain information as to proposed subdivisions and then subsequently obtain information after the subdivisions had been installed and properties had been sold as subdivided properties so that you were in a position to ascertain and know the trends in each of those sections which comprise the general Palm Springs area?

A. Yes. In many instances the same properties of which I had obtained specific information in 1938 were the subject of resale or development in 1943 and the years intervening, I had the specific information regarding those sales on the same property before and after they were subdivided.

Respondents' Exhibit "F"—(Continued)

Q. In this activity that you have described since 1928 and up to the time of your employment in this case, have you had any opportunity to examine subdivision activity and to ascertain the experience of various subdividers in Southern California?

A. I have appraised properties being acquired for that purpose and properties which were already subdivided, and I have been a subdivider myself.

Q. With reference to the Palm Springs area, have you had the same opportunity of examining unsubdivided acreage which was being considered for subdivision, of discussing the plans, designs and intentions of the subdividers before the subdivision—and then of observing what was done after the subdivisions were installed and placed on the market?

A. I have, yes, particularly regarding the properties of Pearl McManus, a large number of which were subdivided during the years 1938 and following.

Q. Can you give us the names of any of the subdivisions which you have been able to follow and have some knowledge of from the time when it was vacant acreage up to the time when it was actually subdivided and being disposed of?

A. I am familiar with the Smoke Tree Ranch subdivision and development in Section 25. I have specific knowledge of Sun View Estates tract; the

Respondents' Exhibit "F"—(Continued)

Deep Well Ranch tract; the La Paz Ranch tract in Section 23; and the present development of the Tahquitz River Estates tract comprising some 150 acres in Section 23. I am familiar with the development of numerous other tracts from the time they were vacant acreage until they were completed and being sold for residential sites and desert estate tracts. Among these are the Luring Sands tract and the Desert Palms Estates, being two subdivisions comprising 60 acres and 40 acres, respectively, in the northwest quarter of Section 13, and most of the subdivisions formerly owned by Pearl McManus in Sections 13, 15, 19, and 23. With respect to some of these subdivisions I have specific knowledge of the purchase price of the rough desert land, the approximate cost of the subdividing and the retail selling price of the improved property.

Q. I have noted that on the petitioners' Exhibit 14-A there is shown an Item No., which is listed as the Ski Club. Are you familiar with that particular property?

A. Yes. I appraised that property for the Lands Division of the Department of Justice. It was originally in the area taken for the Palm Springs Army Airport.

Q. When did you appraise that?

A. In 1943 and again in 1944. The property was not known as the Ski Club, it was the Skeet Club, a sportsmen's club, a club for shooting clay pigeons.

Respondents' Exhibit "G"—(Continued)

held under trust patent by Lee Arenas are assumed to be correct as furnished by your office, and by the Assistant Superintendent of the Mission Indian Agency at Palm Springs, which report a total of 94 acres of land in the Arenas allotments.

In accordance with your instructions, the appraisal herein given of the fair market value of the subject properties is based upon the assumption that good and marketable title to the lands can be delivered by the present owner. In other words, the fair market value herein reported represents my opinion of the present market value of fee simple title to the subject lands.

I understand that these lands are held under a trust patent, and the restrictions upon such a title or right of interest, are covered in Title 25, Section 348, U.S. Codes, which declare:

“That the United States does and will hold the land thus allotted, for the period of 25 years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made * * * and that at the expiration of such period, the United States will convey the same, by patent, to said Indian, or his heirs, in fee, discharged of said trust and free of all charges or encumbrances whatsoever; Provided, that the President of the United States may in any case, in his discretion, extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such convey-

Respondents' Exhibit "G"—(Continued)
ance or contract shall be absolutely null and void."

Under these restrictions, it is my opinion that the trust patent right held by Lee Arenas in these properties has no marketability, and any assignment of his interest in these lands would be null and void, unless such assignment had the specific approval of the Secretary of the Interior, or other competent Federal authority.

I am therefore unable to give you an opinion as to the present fair market value of the trust patent rights held by Lee Arenas in these lands. It is true that Lee Arenas is now obtaining an annual revenue, estimated to be from \$20,000 to \$32,000 per year, from tenants who are supposed to be leasing his allotted lands. Legally, these so-called leases are not in conformity with the rules and regulations set forth by the Secretary of the Interior, and the proceeds of these leases apparently should be paid to the Commissioner of Indian Affairs, to be held for the benefit of Lee Arenas. Under such conditions, it is impossible for me to estimate the fair market value of the trust patent rights held by Arenas.

No appraisal has been made of the buildings or improvements now located on a portion of these lands, it being assumed that these structures are owned by tenants who are renting the sites for these improvements from Lee Arenas.

Based upon my inspection of the subject lands, a comparison of these lands with other similar lands located in the immediate vicinity recently sold, or now offered for sale on the open market, and by

Respondents' Exhibit "G"—(Continued)

reason of my experience as a realtor and appraiser, I have formed the opinion that the fair market value of fee title to these lands, as of February 9, 1948, is the sum of Two Hundred and Forty-Five Thousand Dollars (\$245,000.00).

Your attention is called to the factual data, photographs, maps and reports of interviews had in connection with the appraisal investigation which are herewith submitted jointly by Appraisers Bernard G. Evans and Donald C. Jones, under separate cover, and which are a summary of the basic information upon which this appraisal is predicated.

No responsibility is assumed in this appraisal for matters which are legal in nature. I have no personal or financial interest in any of the property herein appraised, nor is my opinion of value in any way influenced by my employment in this matter.

I am prepared to testify in Federal Court as a witness in this matter in support of the opinions and values herein expressed.

Respectfully submitted,

/s/ DONALD C. JONES, M.A.I.

Appraiser.

DCJ:gb

Summary of Appraisal

	Market Value of Fee Title:
Subdivided and Leased Lands with Palm Springs	
City Water in Section 14, T4S, R4E:	
Lot 46—2 Acres at \$6,400 per Acre.....	\$12,800
Lot 47—2 Acres at \$6,400 per Acre.....	12,800
<hr/>	
Sub-Total—4 Acres Land in Sec. 14.....	\$25,600

Respondents' Exhibit "G"—(Continued)

	Market Value of Fee Title:
Subdivided and Developed Lands with Palm Springs City Water in Section 26, T4S, R4E:	
Lot 39—5 Acres at Av. \$8,000 per Ac.....	\$40,000
Lot 40—5 Acres at Av. \$8,000 per Ac.....	40,000
	<hr/>
Sub-Total—10 Acres Fronting Palm Canyon Dr.	\$80,000
Undeveloped Desert Lands with Water Rights, in Section 26, T4S, R4E:	
SE $\frac{1}{4}$ of NW $\frac{1}{4}$ of NW $\frac{1}{4}$ —10 Acres	
SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of NW $\frac{1}{4}$ —10 Acres	
E $\frac{1}{2}$ of SW $\frac{1}{4}$ of NW $\frac{1}{4}$ —20 Acres	
SE $\frac{1}{4}$ of NW $\frac{1}{4}$ —40 Acres	
	<hr/>
Sub-Total	80 Acres
Desert Land at \$1750 Acre.....	140,000
	<hr/>
Grand Total—94 Acres	\$245,600
Fair Market Value of Fee Title to Arenas Lands as of February 9, 1948.....	\$245,000

Appraisal Report

Owner: Lee Arenas, a member of the Agua Caliente Band of Mission Indians, Palm Springs Indian Reservation, Riverside County, California.

Trust Patent: A Judgment of the United States District Court at Los Angeles, in Action No. 4405—O'C Civil, granted to Lee Arenas certain allotted lands of the Palm Springs Indian Reservation, to be held under terms of a Trust Patent until 1952, at which time the United States will convey these properties by patent to Lee Arenas, or his lawful heirs, free of all charges, or encumbrances; Provided, that the President of the United States may, in his discretion, extend the period of the Trust for an additional 25 years.

Respondents' Exhibit "G"—(Continued)

Arenas Lands: The properties allotted to Lee Arenas, and held in trust for him under terms of aforesaid Trust Patent, are described as follows:

Parcel 1—Lot 46, Sec. 14, T4S, R4E.... 2 Acres

Parcel 2—Lot 47, Sec. 14, T4S, R4E.... 2 Acres

Parcel 3—Lot 39, Sec. 26, T4S, R4E.... 5 Acres

Parcel 4—Lot 40, Sec. 26, T4S, R4E.... 5 Acres

Parcel 5—SE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 26,

T4S, R4E10 Acres

Parcel 6—SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 26,

T4S, R4E20 Acres

Parcel 7—SE $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 26,

T4S, R4E40 Acres

Total Land.....94 Acres

Location and General Description: These properties are all located within the city limits of Palm Springs, California, a desert resort community, which is the trading center for an extensive recreational area. The city is situated at the base of San Jacinto Mountain, about three hours by rail or highway from the metropolitan center of Los Angeles.

Indian Lands in Palm Springs: The City of Palm Springs presents a land ownership condition which is unique. Every even numbered section of land within the city limits, (with the exception of the east half of Section 10, which was traded for an equivalent area in Banning about 1911) is Indian land, and was set aside for use of the Agua Caliente Band of Mission Indians by President

Respondents' Exhibit "G"—(Continued)

Grover Cleveland in 1896, pursuant to an Act of Congress. The alternate odd numbered sections of land were earlier railroad grants which have passed into private ownership.

While the lands in private ownership within the city have been largely developed and subdivided into business income, high-class residential, or desert estate tracts, the Indians and their official and unofficial advisors have been indifferent to the responsibilities imposed upon them by ownership of almost half of the area of this important resort community. Federal regulations governing the administration of the Palm Springs Indian Reservation are no different from those applied to all Indian lands, and are designed to meet only the problems of management and administration of remote, non-urban Indian land and the peculiar culture of a non-urban people.

Growth and Development of Palm Springs: In forming an opinion of the fair market value of the properties herein appraised, a study has been made of the growth and development of Palm Springs, together with an analysis of the trend of the real estate market in this community.

Prior to 1938, the city was unincorporated, and a wide fluctuation has been experienced in selling price of residential property and desert acreage adapted to residential development. A real estate "boom" during 1935 to 1938, flattened out in 1939-40. Establishment of the Torney General Hospital and Army Air Base at Palm Springs brought a marked influx of business and year-round residents

Respondents' Exhibit "G"—(Continued)

to the community. Real Estate sales were greatly increased, and market values of all properties rose rapidly during the years 1943 to 1947.

Since 1947, a noticeable lag in sales volume has occurred, and many real estate brokers are fearful that the "boom" has again flattened out.

Palm Springs is recognized as one of the leading winter-resort playgrounds of America. A large number of wealthy people have invested in elaborate desert estate homes here, and the growth of the community has been phenomenal.

"A Master Plan of Palm Springs Development", being a report prepared by L. Deming Tilton, Engineering Consultant, and submitted to the City Council of Palm Springs March 4, 1941, presents a comprehensive study of the entire community and a definite plan for its future growth.

This report emphasises that all even numbered sections of land in the community are owned by the Agua Caliente tribe of Mission Indians, and are consequently eliminated from the real estate market.

The "Master Plan" proposed by Mr. Tilton and adopted by the Palm Springs Planning Commission, proposes the development of Section 14, now a part of the Indian Reservation, as a large park and community center.

Other ambitious development schemes, such as construction of a tramway up the slopes of San Jacinto Mountain and establishment of one of the world's highest and best ski-jumps there, is now under construction.

These plans are considered to have a bearing on

Respondents' Exhibit "G"—(Continued)

the present market value for undeveloped lands suitable for future desert estate subdivision.

Development in Section 14: Lands in Section 14, T4S, R4E, which is a part of the Indian Reservation, adjoin the very heart of the business center of Palm Springs. Around the hot springs which exist in Section 14, and covering about 300 acres of the westerly portion of this section, plots of land of widely varying sizes and shapes, and often indefinitely outlined, have been assigned as sites for structures, trailer camps, and various activities at widely varying rentals. Development of the Indian lands has been generally formless and irregular, due to the absence of any dedicated rights of way for streets.

A portion of Section 14 immediately adjacent to Indian Avenue (the west line of this section), has been arbitrarily divided into plots of 2 acres each, with each plot having a width of 165.5 feet and a depth of 525 feet. Some of these lots have frontage on unimproved dirt streets, while others have no means of access to any defined roadway.

Arenas' Lots 46 and 47: Lots 46 and 47, allotted to Lee Arenas, are situated on the second dirt road easterly of Indian Avenue, about 330 feet southerly of the extension of Arenas Road which, westerly of Section 14, is a dedicated street near the center of the business district of Palm Springs. Each of these lots contains 2 acres, and each has been subdivided into 12 sites, which are available for

Respondents' Exhibit "G"—(Continued)

rent under a permit of use as residence or trailer sites.

According to C. H. Perdew, Assistant Superintendent, Palm Springs Indian Agency, these small lots rent to negroes, Mexicans, and "poor white trash", at an annual rental of \$100 per year for 8 inside sites and \$120 per year for 4 corner sites. Total gross revenue under this rental schedule would be \$1280 per year for each 2 acre lot, if all space is rented, or at the rate of \$640 gross income per acre per year.

Improvements constructed on these lots are all very cheap, and the entire district is unattractive, disorderly and run-down. Structures are owned by tenants who rent the land under 5-year permits with 30-day cancellation clauses.

City water is piped into this district by the Palm Springs Water Company, costs of installation of pipe line being advanced by water users under a refunding agreement.

Water Supply: Palm Springs is favored by having an ample supply of good quality water, which is adequate for any future growth of this desert resort community over a long future period.

The Palm Springs Water Company owns the flow of Chino Creek (averaging 140 miner's inches), Snow Creek, (averaging 75 miner's inches) and two wells at the north end of town, (producing 110 miner's inches). This water company is now entirely free of funded debt, and has storage facilities and a distribution pipe line system adequate for a

Respondents' Exhibit "G"—(Continued)
population over twice the present size of the community.

Domestic water from the Palm Springs Water Company is now connected without cost to users in developed subdivisions, the rate being graduated from \$1.15 for 400 cu. ft. or less, to 10c per 100 cu. ft. for all over 25,000 cu. ft. per month.

The Whitewater Mutual Water Company owns 500 miner's inches of the gravity flow of Whitewater River, which is piped to the city by 14 miles of steel pipe line under 75 lbs. pressure. This water is utilized by shareholders of the company for irrigation of lawns, gardens and landscape features. Cost of this water is very reasonable, being \$16 annually per meter connection, plus assessments which average 80c per share per year. Based on 2 shares of stock per acre, the average water cost is only \$17.60 per year per acre.

Water Supply to Arenas' Lands: As above stated, Lots 46 and 47 in Section 14 are served by the Palm Springs Water Company, under the city's domestic water supply system.

All the Arenas' lands in Section 26 are within the "irrigable area" of the Palm Springs Indian Reservation. The Indians own water rights in Andreas Canyon, Murray Canyon and Palm Canyon, which provide a sufficient flow of gravity water to supply the present and probable future needs of the lands in Section 26, which are classed as potentially irrigable. This gravity flow water is piped to Section 26 in concrete pipe lines.

Respondents' Exhibit "G"—(Continued)

Lots 39 and 40, being 5 acres each, in Section 26, are also served by the Palm Springs Water Company. Two main distribution lines of the city domestic water system, (4" and 6" respectively) are on Palm Canyon Drive at the west side of Section 26, and on the Palm Springs—Indio State Highway, along the north side of the section.

Tenants on Lots 39 and 40 have the right to connect to existing city water system at the usual rates for service.

It is presumed that the city water lines would be extended to serve the additional Arenas acreage in Section 26, if this area were developed, under the customary refunding plan for payment of costs of installation.

Topography, Soils, and Development of Arenas' Lands: Lots 46 and 47, in Section 14, are nearly level land, with a good sandy silt soil. They are well adapted to irrigation agriculture, but are now being utilized for rental sites for small houses, trailers, etc.

Lots 39 and 40, in Section 26, are fairly level to slightly undulating. The soil is principally a coarse sandy loam, but has previously been under cultivation and irrigation. A portion of these two 5-acre lots were once included in an apricot orchard. There are numerous large cottonwoods and other shade trees growing on the area.

Practically all of the land in Lots 39 and 40 is now utilized for small cabin sites, trailer parks and cheap shacks. There is no defined street system, and

Respondents' Exhibit "G"—(Continued)
the entire development is a "hodge-podge" of ramshackle structures, auto trailers and poorly constructed dwellings.

The buildings and structures on Arenas lands are owned by tenants, who pay rent directly to Arenas or his agents, and none of these improvements are included in this appraisal.

The 80 acres of undeveloped desert land in the NW $\frac{1}{4}$ of Section 26 held under Trust Patent for Lee Arenas is typical raw desert acreage, covered with greasewood, cactus and other desert growth. Many small swales and washes cut the surface. The easterly portion of the area is subject to flood hazard by storm water run-off from Murray, Andreas and Palm Canyons.

Highest Use and Adaptabilities of Arenas Lands: Lots 46 and 47 in Section 14, as previously stated, are best adapted to use as cabin and trailer sites, and under existing conditions can be rented at a good rate for such use.

Any development of these lots for higher type of residence or business income subdivision would depend entirely upon a similar development of tribal lands of the Indian Reservation which surround them.

Zoning restrictions of the City of Palm Springs, which classifies these lots in Zone R-1A, for single family residences only, may not be enforceable as to Indian Reservation lands, but no building permits will be issued, nor city water or sewer connections permitted to non-conforming users of these lands.

Respondents' Exhibit "G"—(Continued)

Lots 39 and 40, in Section 26, each have 330 feet of frontage on Palm Canyon Drive, and are located across the street from a high-class residential subdivision.

If held in private ownership, it is conceivable that these two 5-acre lots could be cleared of their present unsightly structures, and subdivided into desirable homesites. The location and environment is good, and city water and utilities are available on the land.

The 80 acres of desert land in Section 26, which is at present undeveloped, could be gradually subdivided as demand for desert homesites increases, or a portion of the area could be utilized for a trailer park. This land is also well adapted to development as a combination "dude ranch" and desert estate subdivision, similar to the "Smoke Tree Ranch" in Section 25, adjoining on the east.

This area is comparatively free from severe desert winds, and could be readily protected from erosion hazards. Access to existing paved roads on the west and north lines of Section 26 could be had by constructing roads on quarter section lines, or across lands in Lots 39 and 40, in Arenas' ownership.

Any development of these lands as suggested, is dependent upon their ownership in fee, as restrictions of the Trust Patent now held by Arenas, do not permit financing of any ambitious development, nor the sale of any portion of the property.

Fair Market Values: According to the consensus of opinion among active real estate brokers and

Respondents' Exhibit "G"—(Continued)

subdividers with long experience in Palm Springs, no undeveloped desert acreage in this community, even though adapted to residential subdivision, has a value in excess of \$2500 per acre. Costs of subdivision, installation of improvements, and selling costs make it impossible to gain a profit commensurate with the risks involved if a price in excess of \$2500 per acre is paid for the raw land.

Despite these opinions, the developed portion of Lee Arenas' lands (i.e., lots 46 and 47 in Section 14, and Lots 39 and 40 in Section 26) are now rented at unusual rates, and are bringing the owner a net income variously estimated at from \$20,000 to \$32,000 per year.

If these lands were owned in fee by Lee Arenas, and could be sold by him, it is my opinion that they could still be operated on a lease-rental basis, for cheap homesites, trailer camps, etc.

Capitalized Value: In addition to a careful consideration of the present real estate market for comparable properties in this vicinity, as reported under "Market Data" in the joint factual data report accompanying this appraisal, consideration has been given to the capitalized value of the rented portion of the Arenas lands.

In my opinion, the risks involved in such rentals, and the possibility of interference by City Zoning restrictions, would make any prudent buyer demand

Respondents' Exhibit "G"—(Continued)

a minimum return of 10% upon his investment in these lands.

Capitalizing the probable rental value of the Arenas' lots, as shown by present rental rates, established by the Indian Agency on adjacent properties (See Market Data, Items 16, 17, 18) at 10% per annum, we find the value of the Arenas lots to be as follows:

Lots 46 and 47, Section 14—4 Acres:

Each lot contains 2 acres, subdivided into 12 rental sites, with a gross rental schedule of \$640 per acre per year.

Gross income of \$640 per year, capitalized at 10%, gives a capitalized value of \$6,400 per acre.

4 acres at \$6,400 per acre.....\$ 25,600

Lots 39 and 40, Section 26—10 Acres:

These lots have a combined frontage of 660 feet on Palm Canyon Drive, and are zoned R-1 for a depth of 150 feet. This area contains 2.27 acres.

Comparable property on Palm Canyon Drive, farther from town, is now renting at the rate of \$700 per acre per year. (See Market Data, Item 18). It is believed that Lee Arenas is renting lands in Lots 39 and 40 at a rate exceeding this sum.

Recent sales of residence lots on Palm Canyon Drive (See Market Data, Items 1 and 2) indicate a present market value for this frontage of \$50 per front foot, for subdivided lots, with all utilities available.

The Palm Canyon frontage of this property, as unsubdivided land, is considered to have a value, wholesale, of \$35 per front foot, for a depth of 150 feet.

2.27 Acres (660 ft. x 150 ft.) 660 frt. ft. at

\$35 per front foot.....\$ 23,100

Sub-Total\$ 48,700

Remainder of Lots 39 and 40:

7.73 acres, with city water, now rented for use as small residence sites, cabin sites and auto trailer parks;

Respondents' Exhibit "G"—(Continued)

adapted to desert estate or residential subdivision:	
At average \$7,350 per acre.....	\$ 56,900
80 acres undeveloped desert land in NW $\frac{1}{4}$ of Section 26, with water rights, but no water piped to land; adapted to "dude ranch" and desert estate subdivision:	
At average \$1,750 per acre.....	140,000
<hr/>	
Total.....	\$245,600
Fair Market Value of Fee Title to Arenas Lands as of February 9, 1948 (Adjusted to nearest \$5,000).....	
	\$245,000

Summary of Qualifications of Donald C.
Jones, Appraiser

Born: Madison County, Montana, October 30,
1896.

Education: University of Wisconsin, 1915-1917;
1st Lieut., 15th US Cavalry; AEF France, 1917-
1919; University of California (Berkeley) BA De-
gree 1921.

General Experience:

Foreman, Bastanchury Ranch Co., Orange Co.—
1921-24.

Owner and operator, various citrus groves, ranch
properties and income properties in Orange, River-
side, San Diego, and Los Angeles Counties, 1924
to present time.

Member, Board of Directors, Orangethorpe Citrus
Assn. (1924-26).

Member, State Agricultural Advisory Commit-
tee (1928-30).

Field Representative, California-Arizona Citrus
Marketing Commission (1934-35).

Member, Board of Directors, Brea Lemon Grow-
ers, Inc.

Respondents' Exhibit "G"—(Continued)

Partner, Prizer Manufacturing Company.

Partner, Valley View Ranch, Brea, operating 300 acres lemons in Orange County—1941 to present time.

Real Estate and Appraisal Experience:

Licensed Real Estate Broker, California, continuously since 1927.

Bought and sold for own account, and acting as broker for clients, numerous citrus, farm and income properties throughout Southern California since 1926.

President, Fullerton Realty Board (two terms) 1928-30.

Member, California Real Estate Association.

Member, National Association of Real Estate Boards.

Member, Institute of Farm Brokers.

Member, American Right of Way Association.

Member, American Institute of Real Estate Appraisers.

Actively engaged in appraisal of all types of real estate throughout Southern California continuously since 1928.

Appeared as expert witness on market value of real property in civil actions and condemnation cases in the Federal Courts, and in the State Superior Courts of Orange, Riverside, San Bernardino, Ventura, and Los Angeles Counties.

Among many individuals, corporations and public bodies employing my services as an appraiser, the following is a partial list of more important clients:

The Title Insurance & Trust Company of Los Angeles.

Respondents' Exhibit "G"—(Continued)

The Italian Vineyard Company. Appraisal of 5,000 acres vineyard, winery and plant.

Board of Supervisors of Orange County.

Orange County Flood Control District. Appraisal of 8,000 acres of agricultural lands in Riverside and San Bernardino counties affected by Prado Flood Control Basin; Railroad and Highway relocations, witness in condemnation cases affecting same.

The Metropolitan Water District of Southern California: Chief Appraiser (1932-42) on per diem contract; Appraisal of all lands and property affected by Colorado River Aqueduct and appurtenant works, from Colorado River to 13 Member Cities of the District, including rights-of-way for pipelines, tunnels, transmission lines; roads, reservoirs, camp and construction areas. Witness in all civil cases affecting real property.

The Santa Ana Valley Irrigation Company: Appraisal of all real estate holdings of this public utility in Riverside, San Bernardino and Orange counties.

The Federal Land Bank of Berkeley: Appraisal of citrus and ranch properties in Orange, Riverside and San Bernardino counties for bank loans.

The Federal Intermediate Credit Bank.

The Federal Reserve Bank of Los Angeles.

The Federal Works Agency: Appraisal of Los Angeles Hotel properties.

The Irvine Ranch Company: Appraisal of over 4,000 acres of highly developed farm properties in Orange County being taken by Federal Government for war purposes.

Respondents' Exhibit "G"—(Continued)

The Moulton Ranch Company: Partition of 22,000 acre stock ranch.

The Bastanchury Ranch Company: 2,500 acre citrus property.

Azusa Foothill Citrus Company: 600 acre citrus groves.

The Consolidated Rock Products Company.

The United Concrete Pipe Company.

The Union Pacific Railroad: Appraisal of walnut, citrus and farm properties in Northern Orange County and Whittier district affected by railroad right-of-way. Witness in Federal Court re same.

State of California, Division of Highways; Division of Beaches & Parks.

The Riverside County Counsel.

The Los Angeles County Counsel.

The United States Engineers: Appraisals throughout Southern California of many types of real estate being acquired by United States for Flood Control projects, army bases, airports, etc.

The United States Navy: Appraisal of lands being taken for airports, naval bases, bombing ranges, harbor improvements; San Diego Aqueduct Right-of-Way.

Department of Justice, Lands Division: Appraisal of many types of rural, city, and harbor properties being acquired by various Federal Agencies in condemnation proceedings, throughout Southern California. Witness in Federal Court re same.

Appraisal of 10,000 acres in San Joaquin Valley

Respondents' Exhibit "G"—(Continued)
affected by the Central Valley Project, US Bureau
of Reclamation.

Additional Qualifications of Donald C. Jones
as an Appraiser of Properties in the
Palm Springs District

I first became familiar with real estate value in Palm Springs and vicinity in 1928 and 1929, at which time I was acting as a real estate broker, handling transactions involving the exchange of citrus properties in Orange County for residential income property and business frontage lots on Palm Canyon Drive in the center of the developed section of the community.

In May, 1938, I was employed by Pearl McManus of Palm Springs, and her attorney, E. Heber Winder of Riverside, to appraise approximately 500 acres of land in Sections 19 and 29, T4S, R5E, owned by Pearl McManus. These properties were the subject of a damage suit (Pearl McManus vs. Smoke Tree Ranch) in the Superior Court of Riverside County. The litigation involved the question of depreciation in market value to the properties occasioned by a flood in Palm Canyon in 1937.

An extensive survey of the real estate market in Palm Springs and vicinity was made by me at that time, and I personally inspected practically all of the undeveloped acreage and the areas which at that time were being subdivided and offered for sale.

Attorneys for the plaintiff, Pearl McManus: E. Heber Winder and Vincent Morgan; attorney for

Respondents' Exhibit "G"—(Continued)
defendant, Smoke Tree Ranch (Mr. Markham of Pasadena was the principal owner): H. L. Thompson of Riverside.

In May, 1943, I was employed by the United States Engineers to appraise properties in Section 13, T4S, R4E, and Section 19, T4S, R5E, in the city limits of Palm Springs, being acquired by the United States Government for the Palm Springs Ferry Command Airport Expansion, and for a sewage disposal plant site. My written appraisal report covering these properties was submitted to the Office of the Division Engineers in Los Angeles on May 21, 1943.

Following my employment for the United States Army Engineers, I was employed during the period August to October of 1943 by the Lands Division, Department of Justice, to appraise properties being taken by the United States Government for expansion of the Torney General Hospital (formerly El Mirador Hotel), case No. 2689-BH; the Palm Springs Army Air Base, case No. 2654-Y; and the Sewage Disposal Plant Site and Right of Way for Pipeline and Road, cases No. 2478-BH and No. 3014-O'C. I also appraised leasehold rights being acquired by the United States Government on areas leased for the expansion of the Palm Springs Army Air Base (case No. 2800-BH).

These appraisal assignments required a detailed study of the real estate market in Palm Springs and vicinity, and an investigation of the sales and listings on all types of residential and business properties, as well as undeveloped desert acreage.

Respondents' Exhibit "G"—(Continued)

My written appraisal report on the Palm Springs Airport, the Torney General Hospital, and the Right of Way for Sewer Lines and Roads was submitted to the Lands Division, Department of Justice, attention Mr. Alexander W. Staples, Special Attorney, on September 27, 1943.

In January, 1944, I was again employed by the Lands Division, Department of Justice, to re-appraise a business property known as "The Skeet Club", which had been taken for expansion of the Ferry Command Airport Expansion. This property was owned by Carl Bradsher, who was represented by Attorneys Roy W. Colgate and H. L. Thompson of Riverside, in Condemnation Case No. 2654-Y. The appraisal required a study of the adaptability of the property for use as a gun club and sportsmen's recreational area. The property is located in Section 13 on Ramon Road, approximately two miles east of Palm Canyon Drive, the main business street of Palm Springs.

Factors Considered in Determining the Market
Value of the Lee Arenas Trust Patent

Assuming that the trust patent rights held by Lee Arenas in these lands can be sold, or assigned to a purchaser, and

Assuming that the trust patent rights so assigned would be subject to all the existing restrictions and limitations now imposed upon these rights with the exception of the right to convey these trust patent rights, it is my opinion that the fair market value

Respondents' Exhibit "G"—(Continued)
of these trust patent rights is 20% of the Fee Value of the Property.

Fee value appraised at \$245,000; 20% of \$245,000—\$49,000.

Fee Market Value of Trust Patent Rights adjusted to \$50,000.

This opinion is based on the following factors:

1. Present trust patent rights held by Lee Arenas continue until 1952, at which time he has the right to receive a fee patent to this property; consequently, a purchaser of the trust patent rights would be restricted until 1952 to the use of the lands now enjoyed by Arenas, and subject to the regulations of the Secretary of the Interior.

2. The President of the United States has the authority to extend the period of the trust patent for an additional 25 years, and any prudent buyer of this trust patent right would be advised that the President has seen fit to extend similar trust patent rights of Indians on many occasions in the past.

3. The holder of the trust patent rights would be unable to use the property for collateral for any loan, and would be unable to lease the property, except under the rules and regulations established by the Commissioner of Indian Affairs and the Secretary of the Interior which, at the present time, are limited to the granting of a permit to use the property for a period not exceeding 5 years, said

Respondents' Exhibit "G"—(Continued)
permit containing a clause that the permit may be terminated at any time upon 30 days notice.

4. Any use of the properties for rental or other income producing uses would be in competition with all other tribal Indian lands adjoining the property, and the risks created by such competition and use of adjacent lands in tribal ownership would be considered by any prudent purchaser of these trust patent rights as a factor greatly limiting the future possible development of the land.

Conclusion

In other words, it is my opinion that no prudent buyer having knowledge of all of the facts involved in the ownership of a trust patent of this nature would risk a capital investment for the purchase of such rights for any sum in excess of 20% of the full fee value of the property.

Admitted in Evidence 2/20/48.

RESPONDENTS' EXHIBIT "H"

In the District Court of the United States In and
For the Southern District of California
Central Division

No. 1321-O'C Civil

LEE ARENAS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

TESTIMONY OF BERNARD G. EVANS AS TO
HIS QUALIFICATIONS AS AN EXPERT
REAL ESTATE APPRAISER.

Pursuant to the Order of this Court made on Friday, February 13, 1948, the following testimony of Bernard G. Evans as to his general and special qualifications as an expert real estate appraiser is hereinafter set forth in question and answer form and subscribed to by said witness:

Q. Where do you live, Mr. Evans?

A. In the City of San Bernardino, California.

Q. How long have you resided there?

A. Since 1932.

Q. What is your occupation?

A. Real estate broker, appraiser, and subdivider.

Q. Are you a licensed real estate broker?

A. Yes. I have been a licensed real estate broker since 1923 with the exception of a three-year period from 1932 to 1935 when I was a deputy in the State

Respondents' Exhibit "H"—(Continued)

Division of Banking, and three and a half years from the fall of 1942 until early 1946, during which time I was in active service in the Marine Corps.

Q. How old are you, Mr. Evans?

A. 48.

Q. What education have you had?

A. I was educated in the public schools of Santa Monica and graduated from the California Institute of Technology in Pasadena in 1923.

Q. In connection with your activities as a real estate broker, have you had occasion to make appraisals of fair market value of real estate?

A. Yes, I have.

Q. During your activity as a real estate broker, have you engaged in any real estate activities on your own account?

A. Yes, rather considerably.

Q. Have you had occasion to deal with raw land which had not been subdivided, in selecting, designing, and improving properties which became actual subdivisions and were disposed of as such?

A. Yes. That was my principal activity from 1923 to 1932, and I have continued in such activity up to the present time.

Q. Are you engaged in subdividing properties at the present time?

A. Yes. I have four subdivisions in various stages of development and completion now.

Q. Where are they located?

A. One in the City of Riverside, two in San Bernardino County near the City of San Bernardino,

Respondents' Exhibit "H"—(Continued)

and one in Santa Monica, which consists of some 20 acres of the Ranch of the former Will Rogers.

Q. Has that activity included not only the selection and supervision of subdivision property, but also the ascertainment of the varied requirements of the law and the monetary requirements for such development?

A. Yes.

Q. Have you had any such properties in or near Palm Springs?

A. Yes, in 1925, a firm of which I was an officer and stockholder, entered the Palm Springs area as sales agent on a tract of approximately 100 acres, known as Merito Vista, and in 1926 we purchased 100 acres of raw land which was developed into a subdivision of approximately 210 residential lots and which was known as Las Palmas Estates.

Q. Where were these subdivisions located with reference to the present center of Palm Springs?

A. They are both in Section 10, Merito Vista being on the west side of Palm Canyon Drive, approximately one-half mile north of the center of town, and Las Palmas Estates being adjacent to Merito Vista on the north.

Q. In connection with your activities as an appraiser, have you made appraisals for any banks?

A. Yes, I have made numerous bank appraisals from 1936 until I entered the service in 1942. I was a field appraiser for the Bank of America on a retainer basis. I have also made appraisals for other banks and trust companies.

Respondents' Exhibit "H"—(Continued)

Q. Have you made appraisals for various agencies of the United States Government?

A. Yes.

Q. What agencies?

A. The U. S. Army Engineers, the Lands Division of the Department of Justice, the Federal Works Agency, the Federal Housing Authority, and for the Veterans Administration.

Q. Have you appraised for the State of California or any of its agencies?

A. Yes. I have made numerous appraisals for the State Division of Highways, the State Department of Finance, State Banking Department, and the California Veterans Board.

Q. Have you made appraisals for any Counties in Southern California?

A. Yes, I have appraised for the County of San Bernardino on a number of occasions.

Q. Have you appraised for the City of San Bernardino?

A. Yes, and at the present time I am engaged in an appraisal for the City of San Bernardino involving the possible acquisition of a site for a civic center.

Q. Have you appraised for any school districts?

A. Yes, I made a number of appraisals and purchases as an agent for the San Bernardino School District, the San Bernardino Primary School District, Colton Union High School District, and the Mission School District near Redlands.

Respondents' Exhibit "H"—(Continued)

Q. Have you made any appraisals for the public utility bodies in this area?

A. Yes, I have made appraisals for the Southern California Edison Company, the Santa Fe Railroad, and the Union Pacific Railroad.

Q. Have you made any appraisals for either water irrigation or flood control districts?

A. I have appraised several thousand acres in the Prado Basin for the Orange County Flood Control District, and later for the Army Engineers who took over the project, and I also made several appraisals for the Metropolitan Water District and am at the present time engaged on an appraisal for the Metropolitan Water District involving lands in the vicinity of Needles, California.

Q. Have you made appraisals for any private corporations or private individuals?

A. Yes. In addition to the banks which I have enumerated I have done some appraising for the Trust Department for the Bank of America, the Security-First National Bank of Los Angeles, for the American National Bank of San Bernardino, Citizens National Trust & Savings Bank of Riverside, the Pioneer Title Insurance and Trust Company, the Metropolitan Trust Company, the First Federal Savings and Loan Association of San Bernardino, the Santa Fe Federal Savings and Loan Association of San Bernardino, the Occidental Life Insurance Company, the Equitable Assurance Society of the United States, for which society I am at the present time a fee appraiser, for the Triangle Rock

Respondents' Exhibit "H"—(Continued)
& Gravel Company, the Loma Linda Foundation of the College of Medical Evangelists, and numerous individuals. Last year I appraised several thousand acres of resort lands surrounding Lake Arrowhead as an associate of the American Appraisal Company, the appraisal being made for the Santa Anita Turf Club.

Q. Have you had other experience in appraising resort properties—in the active subdivision of resort developments?

A. Yes, a good deal of my subdivision activity has been in connection with the development of properties in resort areas, such as La Jolla, Laguna Beach, Balboa, Big Bear Valley, and Palm Springs, as well as appraisal experience in other desert communities, such as Indio, Apple Valley, and Lucerne Valley, the latter two being communities in the Mojave Desert.

Q. With what projects were you identified at La Jolla?

A. A subdivision known as the La Jolla Shores, which was a development of 100 acres fronting along the beach immediately adjacent to the then built-up section of La Jolla.

Q. What subdivision activity were you engaged in at Laguna Beach?

A. For several years we were tract managers and sales agents of the development known as Emerald Bay.

Q. What subdivision activity were you connected with at Balboa and its environs?

Respondents' Exhibit "H"—(Continued)

A. The development generally known as Lido Isle in Balboa, in the 1920's.

Q. What particular reference to Palm Springs and its immediate environs have you had any additional subdivision experience, appraisal activity, or have you engaged as a real estate broker in connection with any properties in that vicinity which you have not already referred to?

A. I made several appraisals for the Division of Highways not within the City of Palm Springs, but between Palm Springs and Indio, and between Palm Springs and Banning, and, quite recently, I was designated as one of three Veterans Administration appraisers to complete an appraisal report on a project involving 233 residence units in a new subdivision known as the Tahquitz River Estates located in Section 23 and which is now in process of development. In 1939 I made an appraisal of El Mirador Hotel at Palm Springs in connection with the refinancing of the existing mortgage or bond issue. I believe this was the Occidental Life.

Q. When were you employed to make appraisals in this case?

A. About January 15, 1948.

Dated: February 17, 1948.

/s/ BERNARD G. EVANS

Admitted in evidence 2/20/48.

RESPONDENTS' EXHIBIT "I"

APPRAISAL REPORT

[Letterhead of Bernard G. Evans]

February 7, 1948

Lands Division, Dept. of Justice
808 Federal Building
Los Angeles, California

Attention: Mr. Irl Brett, Special Assistant to the
Attorney General

Gentlemen:

Re: Arenas vs. U.S.A. Case No. 1321—WM

Pursuant to your authorization and request I have made an appraisal of the Arenas properties in the City of Palm Springs, the legal descriptions of which were furnished by your office.

In my opinion the fair market value of the fee title of the properties is the sum of Two Hundred Eleven Thousand Five Hundred Dollars (\$211,500.00).

The complete report on these properties is enclosed herewith and further information is contained in the volume of supplementary data made a part hereto.

Very truly yours,

/s/ BERNARD G. EVANS, M.A.I.

BGE:s

Respondents' Exhibit "I"—(Continued)

Estimate of Value

Having made a careful examination of the following described properties in the City of Palm Springs, California, and having made a thorough investigation of the factors effecting the market value thereof,—as a result of such examination and investigation and by virtue of my experience, I am of the opinion that the present fair market value thereof is as follows:

Parcel (a) Allotment Tracts 46 & 47, of Section 14, Township 4 South, Range 4 East, S.B.B.M. Consisting of 4 acres, m/1	\$ 25,000.00
Parcel (b) Allotment Tracts 39 & 40, of Section 26, Township 4 South, Range 4 East, S.B.B.M. Consisting of 10 acres, m/1	\$ 66,500.00
Parcel (c) E $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ and SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$, and the SE $\frac{1}{4}$ NW $\frac{1}{4}$, all in Section 26, Township 4 South, Range 4 East, S.B. B.M. Consisting of 80 acres, m/1.....	\$120,000.00
Total	<hr/> \$211,500.00

The above estimate of value is subject to the qualifying conditions set forth on the following page.

/s/ BERNARD G. EVANS, M.A.I.

Value of the Trust Patent

It is most difficult to set a figure which would represent the fair market value of what is known

Respondents' Exhibit "I"—(Continued)

as the Trust Patent to the subject lands. Such Trust Patent would appear to give the holder thereof the right to receive the fee title at some later and wholly indeterminate date. According to present laws neither the Trust Patent nor any interest therein is assignable except with the permission of the Secretary of the Interior. While it has been customary to allow some of the Indians who hold allotted lands to enter into leases in their own behalf these leases can apparently be cancelled on thirty days notice by the Indian Office in Palm Springs. It would appear that any purchaser for the Arenas interest would be buying a "pig in the poke". While it is undoubtedly true that Arenas is now receiving a very substantial income from his lands and has been receiving such an income for some years past, nevertheless it appears from a perusal of existing statutes that this income could be cut off on very short notice.

Taking all things into consideration I doubt very much whether the current market value of the Arenas interest in the subject property as such interest exists today, exceeds 25% to 30% of the fair market value of the fee.

Qualifying Conditions

The foregoing certificate of value and the contents of this appraisal report are subject to the following limiting conditions:

1. The legal description furnished me is assumed to be correct.

2. I assume no responsibility for matters legal in character nor do I render any opinion as to the

Respondents' Exhibit "I"—(Continued)

title, which is assumed to be in fee simple. All existing liens and incumbrances have been disregarded and the property is appraised as though free and clear. It is assumed that there exist no undisclosed restrictions or prohibitions concerning the possible development of the property for any purpose to which it appears adapted.

3. Areas, measurements and location of the subject property are assumed to be as shown on the map of the Palm Springs Indian Reservation on display in the office of the Indian Agent, in Palm Springs, California.

4. I believe to be reliable the information furnished me by others, but I assume no responsibility for its accuracy.

5. Possession of this report, or a copy thereof, does not carry with it the right of publication, nor may it be used for any purpose by any but the applicant without the previous written consent of the appraiser or the applicant and in any event only with proper qualification.

6. I have no present or contemplated interest in the property appraised.

7. This appraisal has been made in accordance with the rules of professional ethics of the American Institute of Real Estate Appraisers, of which I am a member.

Scope of Investigation

Legal descriptions of the property under appraisal were obtained from the office of the Lands Division of the Department of Justice. The exact

Respondents' Exhibit "I"—(Continued)

location of the subject lands were ascertained by examining maps of the Indian Reservation in the office of the Indian Agent at the Palm Springs Indian Reservation. Mr. Howard Perdew, the resident agent on the Palm Springs reservation was interviewed and information was obtained from him concerning the present uses of the Arenas properties, as well as the various restrictions controlling their use which have been imposed by the Department of Indian Affairs or the Secretary of the Interior. In company with Mr. Donald C. Jones I made a careful field inspection of all of the Arenas lands. The uses and development of surrounding and nearby lands were carefully noted in order to afford a basis for determination of the highest and best uses of the subject lands.

We then called on Mr. and Mrs. Austin McManus, long time residents and property owners of Palm Springs. The property holdings of Mr. McManus probably exceed those of any other person in Palm Springs area. She has long been active in the development of the community and is considered to be unusually well informed on land values. During the past year or two she has sold a number of parcels of acreage in the general area in which the subject lands are situated. We then called on a number of real estate brokers in Palm Springs in order to obtain from them their opinions as to the current market value of the subject properties. At the same time we secured from these real estate brokers data with respect to recent sales and offer-

Respondents' Exhibit "I"—(Continued)

ing of property in the general vicinity of the subject properties, and adaptable to the same purposes for which the subject lands appear to be adapted. We then made another field tour in order to inspect the listings which we had obtained of properties currently for sale as well as to examine on the ground properties which had been reported as having sold within the past year or two. We then called on Mr. Fred Ingram, manager of the local branch of the Bank of America, in order to discuss recent development in the Palm Springs area with which he might be familiar.

Zoning maps of the City of Palm Springs were examined in order to determine the uses to which the subject property could legally be put if they were considered to be private lands. There appears to be some doubt as to the effect of the zoning ordinances of the City of Palm Springs on land lying within the Indian Reservation. We found however that the Indian Agent is disposed to co-operate with the City of Palm Springs in enforcing zoning ordinances.

Inquiry was made as to current requirements of the City of Palm Springs with respect to creating new subdivisions. It was found that subdivision costs are substantially higher than they were a few years ago, particularly because the City now requires that all streets in newly platted subdivisions be surfaced by the developers.

A final interview was held with the Indian Agent for the purpose of discussing ground leases which

Respondents' Exhibit "I"—(Continued)

he has made on behalf of the Indians. A map was then prepared showing thereon the location of the subject property and also showing thereon the location of properties which have been sold within the past year or so together with the location of other properties currently offered for sale. Photographs of the subject property, of some of the nearby properties, the map herein referred to and complete information with respect to the sale and offering of comparable properties in the locality will be found in the volume of supplementary data accompanying this report. Names of persons interviewed are also set forth.

Legal Description (Parcel A)

Tracts 46 and 47, in Section 14, Township 4 South, Range 4 East, S.B.B.M., in the City of Palm Springs, County of Riverside, California.

General Description (Parcel A)

This parcel consists of 4 acres, more or less, on the West side of an undedicated street which lies two blocks East of Indian Avenue, said parcel being 330 feet South of the Easterly prolongation of the South line of Arenas Avenue. The land is relatively level, on grade with the street, and has a frontage of 330 feet on the undedicated street above referred to, and has a depth of 525 feet. There are no street improvements. Domestic water, gas and electricity are available to the property. Improvements consist of five or six small frame and frame stucco cottages, three of which face the street, and the re-

Respondents' Exhibit "I"—(Continued)

mainder of which lie some distance to the West of the street frontage. On the opposite side of the street are two community buildings, one a church, and the other some type of lodge hall. Surrounding and nearby improvements are dominantly frame cottages which are little more than shacks. Residents of the immediate area are apparently all colored people, and are presumably employed as domestic servants, restaurant help, etc., in Palm Springs.

Zoning maps of the city of Palm Springs show the subject as being in R-1 zone, i.e., for single family residence use only.

Highest and Best Use

For the present, and so long as Section 14, or any considerable part of it, remains as tribal lands, the highest and best use of the subject land would appear to be for modest dwellings, i.e., to a large extent for the purpose to which it is now devoted.

Estimate of Value

Based on what I consider to be the highest and best use, as well as all other uses to which the property appears reasonably adaptable, I am of the opinion that the fair market value of the fee is the sum of Six Thousand Two Hundred Fifty Dollars (\$6,250.00) per acre, or a total of Twenty-Five Thousand Dollars (\$25,000.00).

Basis of Valuation

It is impossible to establish the value of the subject by the comparative method. The rules and regu-

Respondents' Exhibit "I"—(Continued)

lations of the Indian Affairs Office permit the construction of as many as twelve cottages on one of these two acre tracts. Similar tracts are leased by the Indian Agent for the benefit of the tribe, on a basis of One Thousand Two Hundred Eighty Dollars (\$1,280.00) annually. It is presumed therefore that the subject parcel could be leased on an equal basis, and that at the present time an annual ground rental of approximately Two Thousand Five Hundred Dollars (\$2,500.00) could be obtained for the two parcels. The value of Twenty-five Thousand Dollars (\$25,000.00) has been partially based on a capitalization of the estimated income, using a rate of 10%. It is not believed that a purchaser could be attracted by any lower rate of return than 10%. Residential lots of equivalent size in adjacent sections, in improved and restricted subdivisions, would bring a somewhat higher figure than the above.

Legal Description (Parcel B)

Tracts 39 and 40, in Section 26, Township 4 South, Range 4 East, S.B.B.M., in the City of Palm Springs, County of Riverside, California.

General Description (Parcel B)

This parcel consists of 10 acres, more or less square, situated on the East side of Palm Canyon Drive approximately 750 feet South of the junction of Palm Canyon Drive and the state highway from Palm Springs to Indio. Palm Canyon Drive is paved with macadam, and is relatively heavily traveled. Virtually the entire parcel has been improved with small cottages, cabins, trailer facilities and numerous

Respondents' Exhibit "I"—(Continued)

trees. All utilities except sewer serve the property. Improvements in the nature of cabins, cottages and trailer facilities are presumed to be the property of tenants holding ground leases, and no attempt is made to place a market value on such improvements in connection with the land. There are a number of good single family residences along the West side of Palm Canyon Drive opposite the subject property, although much of the frontage on that side is vacant. Further to the West, against the foot of the mountains, are numerous fine homes. Adjacent on the North, East and South are unimproved desert lands.

Zoning maps of the City of Palm Springs show the Westerly 150 feet of the subject as being zoned for single family dwellings, while the remainder of the parcel is zoned for trailer camp purposes.

Highest and Best Use

The Westerly 150 feet of the subject parcel is limited to dwelling use by zoning laws. The highest and best use of the remainder is for trailer camps, auto courts, rental cottages, and similar developments.

Basis of Valuation

Subject parcel has a frontage of 660 feet on Palm Canyon Drive. Recent sales and current offerings of residence sites on Palm Canyon Drive opposite the subject indicate a retail value of \$50.00 per front foot. The value of the 660 foot frontage to a depth of 150 feet is therefore estimated at \$30.00

Respondents' Exhibit "I"—(Continued)

a front foot, or a total of \$19,800.00. The remaining property, consisting of approximately 7.8 acres, is valued at \$6,000.00 per acre, for a total of \$46,800.00, and the value of the entire parcel at \$66,500.00.

On a wholesale basis the frontage value has been set at 60% of the retail selling prices,—it is not believed that a purchaser could be attracted without the possibility of profit afforded by this differential.

It was impossible to locate any land zoned for trailer camp use which had been sold in recent years or which had been offered for sale. The area within the city zoned for such use is quite limited. About 750 feet North of the subject land, on the West side of Palm Canyon Drive is a 20 acre parcel of Indian land which is so zoned, and which is currently leased for \$8,000.00 annually. On a capitalization basis of 8%, a value of \$100,000.00 is indicated for this 20 acre parcel, or at the rate of \$5,000.00 per acre. Subject property is equally well adapted for trailer camp use, and has the advantage of numerous trees affording desirable shade.

Legal Description (Parcel C)

The East $\frac{1}{2}$ of the Southwest $\frac{1}{4}$ of the Northwest $\frac{1}{4}$, the Southeast $\frac{1}{4}$ of the Northwest $\frac{1}{4}$ of the Northwest $\frac{1}{4}$, the Southwest $\frac{1}{4}$ of the Northeast $\frac{1}{4}$ of the Northwest $\frac{1}{4}$, and the Southeast $\frac{1}{4}$ of the Northwest $\frac{1}{4}$ of Section 26, in Township 4 South, Range 4 East, S.B.B.M., consisting of 80 acres, more or less.

Respondents' Exhibit "I"—(Continued)

General Description

This parcel is rough, uncleared desert land lying 660 feet East of Palm Canyon Drive and approximately one quarter mile South of the State Highway from Palm Springs to Indio. The Northerly portion of it adjoins the East line of Parcel "B". It is wholly unimproved and has no frontage on any dedicated street or road. With the exception of Parcel "B" herein referred to abutting lands are likewise rough desert lands, wholly unimproved. The terrain is rather uneven,—the Southeast portion having apparently been cut by flood waters during past years, increasing the natural roughness of the land. For the most part it is covered with native brush.

To the West, across Palm Canyon Drive, are quite a number of expensive houses, most of them nestling against the base of Mt. San Jacinto. Half a mile to the East is the Smoke Tree Ranch development, a subdivision on medium priced desert homes. The section to the North, Section 23, is well developed with residential subdivisions, guest ranches, and some ranch-type hotels. Undeveloped Indian lands lie to the South. The elevation of this 80 acre parcel is higher than the lands to the North, and a good view is afforded to the North over the community of Palm Springs. In general it is favorably located for residential development, being well away from the so-called wind area.

Zoning maps of the City of Palm Springs indicate that approximately 30 acres are within zone

Respondents' Exhibit "I"—(Continued)
"T", (trailer camp area) while the remainder is zoned "E-2," for guest ranch use.

Present Use

None. It does not appear that any portion of this 80 acres has ever been utilized except for possible cattle grazing.

Highest and Best Use

The Westerly portion, consisting of approximately 30 acres, is suited for development into trailer camps, on the presumption that necessary utilities are available. Inasmuch as these utilities now serve property adjacent on the West it appears logical to assume that they would be available to this 30 acres. The remainder of the 80 acre parcel is best suited for development into dwelling sites or guest ranch sites. It is generally comparable to the land in Section 25 which is now used for these purposes.

Basis of Valuation

The value of this 80 acre parcel has been arrived at by comparison with other lands in the vicinity which have been sold in recent months, as well as by taking into account the costs of development for residential or guest ranch purposes. Consideration has been given to the relatively large amount of land also suited to the same type of development, and available in the open market for such purposes. Possible use of a portion of the parcel for trailer camp sites gives the parcel added value. Such portions as are zoned for trailer camp use are consider-

Respondents' Exhibit "I"—(Continued)

ably less valuable than they would be if they were situated on improved roads, or readily accessible from such roads. Were it not for the fact that a portion of this parcel could be utilized for trailer camp purposes I do not believe the fair market value would exceed \$1,000.00 per acre.

Value: 80 ac. at \$1,500.00 per acre, \$120,000.

Summary of Findings

The problem of attempting to place a fair market value on the fee simple title to the subject properties presents some rather unusual problems. Even if Arenas were assumed to have good and sufficient title to his lands the fact remains that they are surrounded by lands of the Indian Reservation, commonly known as tribal lands. While the zoning ordinances of the City of Palm Springs purport to control the present and future use of these Indian lands it appears very doubtful whether these ordinances could ever be enforced against the will of the government. In any event there appears to be no disposition on the part of government agencies to change the use of these properties from the purpose to which they are now devoted.

If all of the lands in Section 14 and 26 were to pass into private ownership, either to the Indians, or through them to other persons, and should all these lands be placed on the market, the effect on real estate values in the City of Palm Springs would be deflationary to a marked degree. It is estimated that at the present time there are enough subdivided

Respondents' Exhibit "I"—(Continued)

lots in the City of Palm Springs to provide for approximately eight times as many dwellings as now exist within the city limits. The value of Parcel "C" of the subject property, i.e., the 80 acres in Section 26, must necessarily be based to a large degree on the potentiality of this property as a subdivision. If subdivided it would be in competition with all other unsold subdivisions within the Palm Springs area, as well as in competition with offerings of unimproved lots within subdivisions previously sold out by developers. There appears to have been a great deal of speculation in Palm Springs lands and lots the past two or three years, but during the past few months this speculation has dropped off to a marked degree. Prices currently obtainable for lots and acreage are less than could have been obtained a year ago. While there is a good deal of building activity at the present time, building costs are very high,—they are estimated to be from 20% to 25% higher than in the Los Angeles area. Such high building costs have slowed up construction, and lack of construction has slowed up subdivision sales. None of the real estate brokers or subdividers contacted felt that the land in Section 26 could be subdivided to advantage at the present time. The City of Palm Springs is meeting increased competition from developments further South and East along the State Highway between Palm Springs and Indio. The development at Palm Village alone, some 18 miles to the Southeast, embraces some 1,500 acres. The permanent population at Palm Springs is

Respondents' Exhibit "I"—(Continued)

well nigh negligible, it having been variously estimated at from 1500 to 3500 persons. Actually the only people who remain in Palm Springs through the summer months are those who are engaged in business there, employees of such businesses and public utilities, caretakers of some of the larger estates and persons employed in the building trades.

My estimate of \$211,500.00 as the present fair market value of the subject property appears adequate, particularly in view of the fact that the most recent acreage sale, embracing a total of some 150 acres, with a frontage of 1320 feet on Palm Canyon Drive and situated a mile closer in to the heart of the city than the bulk of the subject property, was sold during the past few months for a consideration of \$337,500.00, \$100,000.00 of which was paid in cash with the balance payable in five years at 4% interest.

Qualifications of Appraiser

Have been engaged in real estate and appraisal business in Southern California continuously since 1923 with exception of 3½ years on active duty with the Marine Corps during the recent war.

Have been active in the subdivision and development of real property in Los Angeles, Orange, San Diego, San Bernardino and Riverside Counties.

In 1927 the corporation of which I was a stockholder and officer purchased 100 acres in Palm Springs which was developed as Las Palmas Estates, a highly restricted residential subdivision. The corporation was also the sales agent for the ad-

Respondents' Exhibit "I"—(Continued)

jacent 100 acre tract known as Merito Vista.

From 1932 to 1935 served as Special Deputy Superintendent of Banks of the State of California, the greater part of which period was as receiver of the San Bernardino County Savings Bank. Handled many properties during this period in San Bernardino and Riverside Counties.

Since 1935 have been engaged in the real estate and appraisal business in San Bernardino, California. Since that time have appraised numerous properties in Palm Springs, principally in connection with loans made by the Bank of America. I have been a field appraiser of the Bank of America for Riverside and San Bernardino Counties since 1936,—on a retainer basis until I entered the service in 1942,—on a fee basis since that time. I am also a fee appraiser for the Equitable Life Assurance Society of the United States.

Have acted as an appraiser for the following agencies, corporations and government bodies:

City of San Bernardino, County of San Bernardino, State Division of Highways, State Department of Finance, Southern California Edison Company, Metropolitan Water District, Orange County Flood Control District, College of Medical Evangelists, American Appraisal Company, Forest Lawn Memorial Park, U . S. Corps of Engineers, Pioneer Title Ins. & Trust Co., Metropolitan Trust Company, California Veterans Board, Veterans Administration, San Bernardino School District, Colton

Respondents' Exhibit "I"—(Continued)

School District, Victorville School District, Triangle Rock & Gravel Co., etc., etc.

Am actively engaged in the subdivision business at the present time, with two tracts now under sale in the San Bernardino area. Am also actively engaged in the general appraisal business.

Within the past 30 days was one of three appraisers designated by the Veterans Administration to appraise the Taquitz River Estates subdivision in Palm Springs, referred to as Item No. 4 in the volume of supporting data filed in connection with this report.

General and Special Qualifications

(Pertaining to Palm Springs
and Resorts in General)

Bernard G. Evans

From 1923 to 1932 engaged in general real estate development business with subdivision activities in Los Angeles, San Diego, Orange, and Riverside Counties. Active in resort subdivision development—i.e., La Jolla Shores, at La Jolla (owners and developers), Emerald Bay, at Laguna Beach (sales agents), Lido Isle, at Balboa (sales agents), Merito Vista, at Palm Springs (sales agents), Las Palmas Estates, at Palm Springs (partial owners, subdividers, and sales agents). The latter property was purchased as 100 acres of raw land and developed into a high type of residence tract—today ranks as the equal of any such development in the Palm Springs area.

Respondents' Exhibit "I"—(Continued)

1932 to 1935 served as Deputy Superintendent of Banks of California, supervising liquidation of various banks. In July of 1932, and following months, appraised all real estate holdings and real estate securing loans of San Bernardino County Savings Bank—principally in San Bernardino and Riverside Counties. From September 1932 to August 1935 acted as receiver for that bank.

In 1932 re-entered business on my own account in San Bernardino, and again became active in subdivision development and a general appraisal practice. From 1936 to October of 1942 was one of two appraisers for Bank of America making loan appraisals in the Palm Springs area, as well as other desert communities. During that period of time also appraised for the State Division of Highways in this area, covering right-of-way acquisition both between Palm Springs and Indio and between Palm Springs and Banning.

From October 1942 to February 1946 was on active duty with U. S. Marines.

Since February of 1946 have again been in private appraisal practice and in subdivision development.

One month ago investigated residence lot values in Palm Springs in connection with Taquitz River Estates development, and appraised 233 lots in this tract as one of three appraisers appointed for that purpose by the Veterans Administration.

Note: Las Palmas Estates, which was referred to by Gallagher in connection with Bob Hope pur-

Respondents' Exhibit "I"—(Continued)

chase, is a subdivision of 100 acres into 236 residence lots—average lots size about 15,000 square feet, not 800 square feet, as indicated by him.

Currently engaged in making following appraisals:

90 acres adjacent to State Hospital at Patton, for State Department of Finance

One city block in San Bernardino, for City of San Bernardino

Ten acre school addition in Colton, for Colton School District

Fifty-four acres in river bottom below Needles, California, for Metropolitan Water District

Several residence subdivision developments for Veterans Administration.

In 1946 appraised several thousand acres of resort properties, i.e., vacant lands surrounding Lake Arrowhead—employed by the American Appraisal Company—their client, the Santa Anita Turf Club, present owners of Lake Arrowhead.

About 1939 made appraisal of El Mirador Hotel at Palm Springs, in connection with refinancing of existing mortgage or bond issue.

In late 1920's spent a good deal of time in Palm Springs (we maintained a branch office there), and have ridden horseback over lands in Section 26 many times.

Admitted in evidence 2/20/48.

RESPONDENTS' EXHIBIT "K"

[Letterhead of David D. Sallee]

[Stamped]: Received Dec. 6, 1944. Lands Division, Los Angeles, California.

December 5, 1944

Mr. James A. Murray,
Special Assistant to the Attorney General,
Department of Justice, Lands Division,
808 Federal Bldg., Los Angeles 12, California.

Dear Mr. Murray:

In preparing the answers in the various ejectment suits filed by the United States vs. the various Indians, members of the Palm Springs Band of Indians, we find that it has become necessary that we have access to the census rolls and any and all probate records, and any other records whereby we may be able to determine the various marriages, divorces, deaths and the line of inheritance of the various parties of the above mentioned band.

Will you, therefore, arrange with Mr. Dady, Superintendent of the Mission Agency at Riverside, California so that I may inspect the aforesaid rolls and obtain therefrom the necessary information that will enable us to file the proper and appropriate pleadings in the above entitled matters, as well as all guardianship petitions and probate petitions.

Thanking you for your courtesy, I remain,

Yours sincerely,

/s/ DAVID D. SALLEE

DDS:Y

Admitted in evidence 2/20/48.

RESPONDENTS' EXHIBIT "L"

[Letterhead of David D. Sallee]

December 28, 1943

Mr. and Mrs. Lee Arenas
Palm Springs, California

Re: Lee Arenas vs. U. S. of America

Dear Mr. and Mrs. Arenas:

I did not want to take the time last night to talk to you on the telephone on long distance for two reasons; one that it was running up in unnecessary costs and second, a machine was waiting for me and I did not have the time.

Yesterday I received a telegram from Washington, D. C. from the Clerk of the United States Supreme Court requesting that an additional \$35.00 be immediately forwarded to said clerk to cover certain costs in the above entitled case. There is now due a balance of \$85.00 I have not been repaid for myself that I have sent to Washington. I have repeatedly requested that you send me in some money for the last two or three months, and it has been almost impossible to get anything out of you. You knew on November 12th when I was in Palm Springs that there was a balance of \$50.00 due me and you have neglected to send it to me. You say you have other bills, all right, if you won't protect your property you won't have anything to pay other bills, nor anything for yourself. This litigation comes first in everything. I am trying to save your property for you, and it is worth well a quarter million dollars. I am just getting tired of having

to continually argue with you over these costs.

This is the first win and it is an important win for you in your fight. The United States Supreme Court does not grant these writs unless there is real merit in the case, and I am as confident of winning this case as I am that I will be alive tomorrow. Marian you have acted very sulky and I don't like it. You folks spend money right and left, but you have got to change and spend some money to help win this fight. Of course if you don't want your property and want to be put in a gulch and have only \$25 or \$30 a month to live on, all well and good, because that is where you will end up at if you don't use real business sense and cooperate with me. Lee I want you to read this letter thoroughly and I want you to send in this \$85.00 because I need it.

I have got some more briefs to file in Washington before our hearing which will come up some time in March or April I presume, and I want a long talk with you relative to certain other matters within the next ten days. I would like to have you come to Los Angeles the first part of next week.

With kindest personal regards to yourself and wishing you a Happy New Year and awaiting your immediate response to this letter, I remain,

Your truly,

/s/ DAVID D. SALLEE

Admitted in evidence 2/20/48.

DEFENDANTS' EXHIBIT "N"

United States District Court, Southern District
of California, Central Division

No. 1321—WM—Civil

LEE ARENAS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

STIPULATION

It Is Stipulated that Lots 46 and 47 in Section 14 are bounded on the North by Lot 43, on the East by Lots 29 and 42, on the South by Lot 50 and on the West by Lots 45 and 48; that allotment trust patents in severalty have been issued and delivered to members of the Palm Springs Band, other than Lee Arenas, covering Lots 42, 43, 50, 45 and 48.

That Lot 39, the 5-acre tract allotted to Lee Arenas, is bounded on the North by Lot 38 which has been trust patented in severalty to a member of the Palm Springs Band other than Lee Arenas.

That Lot 40, the 5-acre tract selected by Guadalupe Arenas, is bounded on the South by Lot 41 which has been trust patented in severalty to a member of the Palm Springs Band other than Lee Arenas.

That the 40-acre parcel allotted to Lee Arenas is bounded on the North and on the East, in part, by

lands which have been trust patented in severalty to members of the Palm Springs Band other than Lee Arenas.

That the 40-acre tract selected by Guadaloupe Arenas is bounded on the North, East and South by lands trust patented in severalty to members of the Palm Springs Band other than Lee Arenas.

In making this Stipulation, petitioners reserve the right to attack and dispute the validity and effect of such trust patents in severalty in any of the proceedings wherever now pending or which may hereafter be filed in respect to the lands of the Palm Springs Reservation, whether in their own behalf or in behalf of any present or future clients.

Dated: February 6, 1951.

ERNEST A. TOLIN,
United States Attorney,
IRL D. BRETT,
Special Assistant to the At-
torney General,

/s/ By IRL D. BRETT,
Attorneys for Respondents.

JOHN W. PRESTON,
OLIVER O. CLARK,
DAVID D. SALLEE,

/s/ By JOHN W. PRESTON,
Attorneys for Petitioners.

Admitted in evidence 2/7/51.

DEFENDANTS' EXHIBIT "O"

EXCERPTS FROM REPORTER'S TRAN-
SCRIPT OF THE PROCEEDING OF NO-
VEMBER 29, 1950

No. 6221-PH Civil

(Portions of the testimony of
Joseph A. Gallagher, Sr.)

By Mr. Preston:

Q. Mr. Gallagher, you are a resident of the City of Los Angeles? A. I am.

Q. And you have a profession that you follow. What is it?

A. I am a licensed real estate broker and an appraiser, and president of the American Right of Way and Appraisal Contractors.

Q. That company that you last mentioned is a concern organized by you? A. Yes, sir.

Q. How long has it been in existence?

A. About five years.

Q. And what is the business of that concern?

A. We specialize in the appraisal of properties for governmental agencies, governmental bodies, and utility companies, and then in the acquisition of rights of way for both governmental bodies and utility companies.

Q. Do you keep a staff of employees and experts in your organization? A. I do.

Q. About how many have you at the present time?

A. On our pay roll at the present time, we have

Defendants' Exhibit "O" (Continued)

about eight, but we have a great many others who are on constant call, for instance, surveyors and engineers on certain jobs.

Well, for instance, we just completed a 600-mile deal for Standard Oil Company in Utah, Idaho, Oregon, and Washington. We didn't have to bring any engineers in on that job, because Standard's engineers did that work, but in some instances it is necessary, and that is when we bring them in.

Q. Give us a brief narrative of your experience as an appraiser, particularly your connection with the public bodies of this State and Nation, say, over the last 10 or 15 years.

A. I did appraisal work for the Department of Water and Power in the City of Los Angeles in the '30s in the construction of or for the construction of Boulder Canyon transmission line from Boulder Dam.

Also for water supply which the department proposed to bring in from a location north of Bishop, somewhat in the general area of Levining.

Then we did several other jobs for the department at that time.

Q. What other public body have you done appraisal work for?

A. I have done work for the Department of Finance and the State of California, quite a few appraisal jobs for the department.

The United States Treasury, San Francisco office, called me in on a job somewhere in the general location of Pismo Beach. That was on a shipyard,

Defendants' Exhibit "O" (Continued)

San Francisco shipyard, that had been taken over by the Department. I didn't do too much work on that. However, I was called in to appraise machinery.

The County of Ventura, I handled the appraisal and the acquisition rights of way of Matilija Dam and Casitas Dam, and also for the Ventura River levee, from the ocean back to the oil field, which was a distance of approximately two and a half miles. I appraised all that property.

Q. Did it comprise both rural and business?

A. Yes, we had business properties there. There were service stations and motels and some business houses and some groves, and then some raw land, too, like the Taylor Ranch in Ventura County, a very large ranch, possibly one of the largest ranches in Ventura County. We didn't appraise the ranch. We appraised quite a large taking strip along the Ventura River levee, which was formerly a part of the Taylor Ranch.

The widening of Foothill Boulevard in Pasadena, we appraised that for the City of Pasadena, with the State of California having an interest in the widening of the boulevard itself. We appraised and acquired the right of way.

Rosecrans in Compton, the same situation prevailed there.

With Standard and with the Texas Oil Company, I have already mentioned the 600-mile deal for Standard through those neighboring States. There was a 175-mile deal in the early '40s, from

Defendants' Exhibit "O" (Continued)

Kettleman Hills to San Francisco, and several other jobs in Los Angeles County.

With the Texas Oil Company, there was about a 96-mile acquisition through Kern County, Fresno, Tulare, Stanislaus, and a few other counties.

Associated Oil, approximately 26 miles in Santa Barbara County, in the general area of Gavota Pass, with the waste water disposal districts. These districts reach all the larger oil companies in Southern California. We represented the district in the area of Signal Hill, water coming from the wells that must be disposed of in a particular area.

Also, the Sante Fe Waste Water Disposal District, we represented them in a couple of instances, and we are representing them at the present time.

The Southern California Gas and Southern Counties Gas, we appraised and acquired rights of way for the Big Inch gas line, which originated in Texas and New Mexico. However, our appraisal work started at the Colorado River east of Blythe and terminated in Santa Fe Springs, Los Angeles.

Q. A distance of how many miles?

A. About 267 miles, more or less. I may be somewhat incorrect.

Q. Did that take you near the Palm Springs area?

A. Yes, it did. We were north of the Palm Springs area. We were north of the highway over near One Thousand Palms. After we left Indio, we were on the—well, it worked back into the mountains between Indio and Banning and Beaumont. We

Defendants' Exhibit "O" (Continued)

were about two and a half miles north of One Thousand Palms, for instance, north of the Alonzo Bell property and Hidden Springs Ranch. That is Charley Doyle's property.

As I say, that terminated in Los Angeles, but it took in the Palm Springs area.

We have done—when I say "we," I like to use the word "we" instead of "I"—we have done a considerable amount of appraisal work for the Southern California Edison Company.

As a matter of fact, I believe we do most of Edison's appraisal work. In the last year, I believe we have done 35 or 40 appraisal jobs for Edison. Here recently we completed about a 39-mile appraisal for the proposed construction of a transmission line along the San Gabriel River in Los Angeles County, both sides. We are now negotiating and acquiring the rights of way for this transmission line.

We are doing work now—we didn't appraise, however, but we are acquiring properties in four different areas. The newspapers call them "slum clearances." That is the Housing Authority of the City of Los Angeles. We are working on two of those projects. Our contract calls for four, for appraising the entire area of four of them. One we are working on is Rosehill. I had a call this morning on the Aliso Pico, which is over on First Street. We are preparing, and we are ready to start on that. They want us to start tomorrow.

Defendants' Exhibit "O" (Continued)

That, in general, Judge, takes in some of them. There are more, but that is general.

Q. I assume you have been pretty busy.

A. I have been awfully busy, and it has been hard to come to court.

Q. Are you a graduate of a university?

A. Yes, a Catholic university.

Q. What is it? Notre Dame? A. Yes.

Q. That's a good school. What degree did you take at Notre Dame?

A. I had my bachelor's and master's there.

Q. Were you ever sent by the City of Los Angeles to visit any other States which involved appraisal work?

A. Not exactly appraisal work, Judge.

Q. I won't dwell on it, then.

A. I was sent by the Department of Water and Power, I believe it was in 1934, and, well, there were quite a few assignments that I was given at that time, in Phoenix, Arizona, Sullivan, Missouri, Wheeling, West Virginia, Ashland, Kentucky. I went as far as Wheeling, West Virginia, and then worked back in Milwaukee, Chicago, and Kansas City.

Q. What really was your main object there?

A. In acquiring rights of way, rights of way, that is, for the Boulder Canyon transmission line. At Knoxville, Tennessee, it was on a damage suit that was brought against the city. The purpose of that was to locate a certain party and bring him back as a witness.

Defendants' Exhibit "O" (Continued)

The following year the department sent me up to Victoria, British Columbia, and Vancouver, British Columbia.

Q. Have you told all the experience you have had in appraisal work in or near the Palm Springs area prior to the time I am about to question you on?

A. There was a little job I did in Palm Springs that didn't amount to too much. Dolores Hope was interested in buying some property. I don't remember now which section that property was located on. I did at the time I testified in 1947. I believe it was the first investment that Dolores herself made, and she did that irrespective of Bob at the time.

Before she bought, I did appraise those lots. I forget what she paid.

Q. Have you been acquainted with the City of Palm Springs and watched its growth and development?

A. Yes.

Q. I will ask you whether or not, at the request of the petitioners in this case, consisting of Oliver O. Clark, David D. Sallee, and myself, you made an appraisal of certain property in Palm Springs?

A. I did.

Q. What properties were they?

A. Those are the properties in the name of Lee Arenas, located in Sections 14 and 26, four acres, two acre parcels in Section 14, and 94 acres, more or less, in Section 26.

* * * * *

Defendants' Exhibit "O" (Continued)

By Mr. Brett:

Q. Mr. Gallagher, your appraisal of the Lee Arenas parcels was in 1947?

A. That is correct.

Q. Have you been back to the property since that date? A. I have not.

Q. Had you ever made any appraisal in the City of Palm Springs prior to the appraisal of the Lee Arenas properties?

A. I mentioned Dolores Hope, those three lots. I will say, Mr. Brett, that I was in Palm Springs with some of the appraisers for the U. S. Engineers, the Corps of Engineers, when some of those properties were acquired there.

Q. When some of the Government property was acquired?

A. That's right. I didn't appraise, but I was down there and I was consulted on some of those appraisals.

Q. That was in the period prior to 1945?

A. That is correct.

Q. In fact, it was approximately 1942?

A. Approximately 1942.

Q. But with the exception of appraising some three lots for Dolores Hope—when was that, with reference to 1947? Before or after?

A. That was before 1947. I should say about 1946. I believe I am correct there. It was either 1945 or 1946.

Q. Then, as I understand it, with the exception of the fact that you accompanied some government

Defendants' Exhibit "O" (Continued)

men who were appraising some land in 1942 in the Palm Springs area, and one visit to Palm Springs to appraise some two or three lots for Dolores Hope in 1946, and the appraisal you made in 1947, you have had no further activity with reference to Palm Springs?

A. Except with the Big Inch gas line that came through the Palm Springs area, north of Palm Springs, however.

Q. How far north from Palm Springs, about?

A. I should say, if we use Ramon Road as a pivot point, and I had time, Mr. Brett——

Q. Isn't it approximately seven or eight miles?

A. I will give it to you. I want to get my directions, because I am trying to go back three years in memory now, with all the other appraisal jobs I had, and I don't want to make a mistake or give any misconception whatever. If you will kindly bear with me, I will try to straighten myself out, as best I can.

I should say about eight to eight and one-half miles north, or eight to eight and one-half miles east. I got my direction somewhat wrong.

Q. Since this 1947 appraisal of the Lee Arenas property, you have not returned to that area to make an appraisal?

A. That is correct.

Q. And you have not personally visited the site of any of these properties since 1947?

A. That is correct.

Q. (By Mr. Preston): Go ahead with what you

Defendants' Exhibit "O" (Continued)

did to prepare yourself for the expression of an opinion as to the market value of these properties since 1947.

A. In 1947, I visited the Arenas properties and walked on the properties. That is on Section 14. I did not walk over the entire area, but I did walk in from Indian Avenue by these old buildings that are on Section 14. I did the same thing in Section 26.

Then I drove east on Ramon Road to Sunrise north on Sunrise—Sunrise is the easterly boundary line of Section 14. Then north, I believe to Alejo, which is the northerly boundary line of Section 14. I drove around the section, looked at improvements in the sections close to Section 14, and to Section 26.

Then I went to the County Engineer at Riverside and secured a zoning map and a use map. I believe I got my use map from the county engineering department.

I talked to the Water Engineer at Riverside. His name, I cannot remember now.

The Assessor's office at Riverside, we did considerable work in the Assessor's office, trying to ascertain what in their opinion the market value of property was in Section 14 and Section 26, and received considerable information from them.

Then the City Engineer at Palm Springs, and one of the banks, talked to the manager of one of the banks. I am awfully sorry I didn't remember these names. I like to be so well prepared, but unfortunately I am not right now.

Defendants' Exhibit "O" (Continued)

I did talk to the manager of one of the banks there. Talked to the Chamber of Commerce, the City Manager of Palm Springs. I talked to a great many people around Palm Springs.

I talked to brokers and to some property owners. I believe at the time I talked to Mrs. McManus. I am not quite sure of that.

I visited some of the dude ranches to see what particular type of construction was on these dude ranches and how close the ranches were to the two sections that I am referring to.

I made a study of Palm Springs, the location of Palm Springs in relation to its distance from Los Angeles and from the border of Mexico and also from Indio, on different border lines, and found between Palm Springs and Indio there were several communities that had grown up just recently. That would be south of both Section 14 and Section 26.

These communities were Cathedral City and Palm Village, and there were a couple of others in there.

I ascertained that Palm Springs was on the main line of the Southern Pacific Railroad and is serviced by the railroad and by Greyhound buses, Greyhound buses several times a day. The city is also serviced by transcontinental and local air lines.

The general geographic location of Palm Springs and climatic conditions, the rainy season, and whatever considerations an appraiser pays particular attention to.

I found that there are several, not only nationally, I believe, but internationally known places around

Defendants' Exhibit "O" (Continued)

the Palm Springs area. For instance, the Palm Canyon, which is noted for prehistoric Washington palms, or something of that nature. That is six and a half miles south of Palm Springs. Andreas Canyon Road for the palisades, the palms, and old Indian caves. Chino Canyon for the water springs, and several other canyons.

That entertainment was furnished by some very well established places of entertainment. I have a list of them. The list is quite numerous.

That there are a great many hotels in Palm Springs. I ascertained the location of the hotels, the number of rooms, and the rates charged.

For instance, the Ambassador Hotel—I won't go into all of them, because I have quite a list—the Ambassador Hotel at 640 Indian Avenue, the rates are \$40.00 double and \$22.50 single, and there is a swimming pool——

Q. What did you do with reference to examining other pieces of property?

A. I examined quite a few properties in order to establish comparability, to find out what the properties sold for, and in many instances I investigated the assessed value of those properties.

I did that for this reason. I have quite an assessed valuation schedule. I believe there are 66 of them. I realize that the assessed valuation doesn't represent market value. However, I believe that the offices of the county assessors in the State of California have a very fine idea of market value, and when they assess the property they assess at a

Defendants' Exhibit "O" (Continued)

certain percentage of market value. That belief of mine is supported by this fact——

Mr. Brett: Just a minute.

Q. (By Mr. Preston): Perhaps that would be a little further than the question that I have put to your would warrant. Continue with the recital of the properties, if you will, if you haven't finished, that you examined with reference to values.

A. Well, I secured an idea of what properties sold for around Section 14 and also around Section 26.

Q. About how many properties do you think you examined in that respect?

A. Twenty-some-odd properties, Judge. I will have to say, however, that I was not out on all those 20 properties. I was on quite a few of them.

Q. Where did you get your information regarding the properties?

A. The title company in Riverside County, and also in the Recorder's office. I have the I.R.S. stamps on some of those sales, which in a way indicates what the property sold for.

Then, after ascertaining what properties in the general area of the Arenas properties had sold for, or were listed for, I tried to strike an average as to what in my opinion was the fair market value of the two-acre parcels in Section 14 and the five and ten acres and forty acres in Section 26.

Q. Did you compile a written report in connection with those services? A. I did.

Defendants' Exhibit "O" (Continued)

Q. And it is on file in another division of this Court, in the Lee Arenas case, now, is it not?

A. Yes, sir.

Q. Your report is as of what date?

A. I believe December 9, 1947.

Q. At that date you had an opinion, did you, and expressed it, as to the market value of each of these Lee Arenas parcels? A. I did.

* * * * *

Cross Examination

Q. (By Mr. Brett): Mr. Gallagher, you testified at some length as to your previous activities. Your activity in connection with the acquisition of a right of way in the Boulder Dam area was over in the State of Arizona, is that correct?

A. Nevada and California.

Q. Nevada and California? A. Yes.

Q. Approximately how far from Palm Springs?

Mr. Preston: What point?

Mr. Brett: Any point.

The Witness: Let's say starting at Boulder Dam?

Q. (By Mr. Brett): Yes.

A. Mr. Brett, you asked me those questions before and I gave you my answers then. At that time I was well prepared. My distances are in that report. I should say Las Vegas is about—don't hold me too tight to these distances—Las Vegas is about 250 miles from Los Angeles, and Palm Springs about 109 miles from Los Angeles. Maybe between 200 and 275 miles away, that is Las Vegas itself.

Defendants' Exhibit "O" (Continued)

San Bernardino, we came through San Bernardino, through the hills at San Bernardino, and as we worked into Los Angeles——

Q. What is the nearest point to Palm Springs in that activity?

A. I should say San Bernardino.

Q. That would be about how far? Well, do you know whether it is better than 80 miles? Isn't it?

A. I don't know.

Q. And that activity was for the purpose of acquiring a right of way?

A. That is correct.

Q. Not any fee property, but a right of way on property? A. That is correct.

Q. You stated you had some activity for the U. S. Treasury Office, the San Francisco office of the United States Treasury, at Pismo Beach. That is in San Luis Obispo County?

A. That is correct.

Q. And it was approximately how far from Palm Springs?

Mr. Preston: Objected to as immaterial.

The Court: Overruled. You have gone into these matters.

Q. (By Mr. Brett): Isn't that at least 250 miles from Palm Springs?

A. Yes, I would answer to that.

Q. Then you stated you had some activities in connection with various dams, the Matilija Dam and the Casitas Dam in Ventura County.

A. Yes, sir.

Defendants' Exhibit "O" (Continued)

Q. Ventura County is north of Los Angeles County? A. About 65 miles.

Q. And that is approximately 125 to 150 miles from Palm Springs, is it not?

A. Approximately.

Q. Your Ventura River levee would also be at least that distance from Palm Springs?

A. That is correct.

Q. Then you stated you had some employment in connection with the widening of Foothill Boulevard. Foothill Boulevard is a boulevard that runs in both Los Angeles County and San Bernardino County? A. Yes.

Q. Where was your activity?

A. In Pasadena.

Q. That would be how far from Palm Springs?

A. I would say 100 miles, more or less.

Q. That was the acquisition of a right of way?

A. No—Yes, more or less. It was the widening of Foothill Boulevard. That is correct.

Q. Now, then, you stated you had some employment for the Associated Oil Company at Gavota Pass in Santa Barbara County. That is in the northern part of Santa Barbara County, isn't it?

A. It is between Pismo Beach and Santa Barbara. It is about 35 miles north of Santa Barbara.

Q. And that is about—

A. 109 miles, about the same distance from Los Angeles that Palm Springs is from Los Angeles.

Q. In other words, it is over 200 miles from Palm Springs? A. That is correct.

Defendants' Exhibit "O" (Continued)

Q. You stated you had some work in connection with some pipe line commencing at the Colorado River east of Blythe. Blythe is right on the Colorado River at the east boundary of the south part of California? A. That is correct.

Q. It would be about how far from Palm Springs?

A. Well, oh, I should say about 175 to 200 miles.

Q. That was for a pipe line right of way?

A. That was the Big Inch gas line.

Q. To bury a pipe in the ground?

A. That is correct.

Q. You said that you were employed in connection with the transmission line along the San Gabriel River. That is in Los Angeles County just a few miles from this court house?

A. Yes, sir.

Q. That is about how far from Palm Springs?

A. About 100 miles.

Q. You also stated you were employed in connection with some slum-clearance project. As I understand, you have just started upon this work.

A. No. We have been on Rose Hill.

Q. And Rose Hill is not very far from this court house? A. No.

Q. How far?

A. About three miles, three or four miles.

Q. How far from Palm Springs?

A. About 105 miles.

Q. And both Rose Hill and Aliso-Pico you re-

Defendants' Exhibit "O" (Continued)

ferred to are right in the heart of Los Angeles City?

A. That is correct.

Q. You stated you did go to Palm Springs at one time in behalf of Dolores Hope, and I understand she is the wife of Bob Hope, the movie and radio actor.

A. Yes, sir.

Q. Did you go there as her agent, merely to indicate to her what she should or should not buy?

A. Dolores was interested in buying some property in Palm Springs, and before she bought she wanted to know whether or not the location she had in mind was the correct location, and asked me if I would go down and see if I could find something for her, which I did.

I talked to Culver Nichols and I asked Culver to pick up a couple lots for Mrs. Hope in a location which in his opinion would have a future valuation, a location where the property values were increasing, and one of the brokers in his office—I can't remember his name—was the one who found the three lots and told me what the price was, and I recommended to Mrs. Hope that she should buy those lots.

Q. That was your activity in that regard?

A. That is correct.

* * * * *

Q. You stated as a part of your preparation you contacted the County Assessor at Riverside.

A. That is correct.

Q. Riverside is the county seat of the county in which Palm Springs is located?

A. That is correct.

Defendants' Exhibit "O" (Continued)

Q. Was the County Assessor in Riverside able to give you any information as to assessed values in either of these two sections that were a part of the Indian reservation, Section 14, in which the two-acre parcel lay, or Section 26, in which the five- and forty-acre parcels lay?

A. I received no information as to assessed values of properties in Section 14 and Section 26. Information on assessed values was on properties on the surrounding sections.

Q. You received information that those particular properties were not assessed for taxation?

A. That is correct.

Q. You stated you did get the assessed values of properties which surrounded Section 14 in all four directions?

A. Yes, sir.

Q. To the north was Section 11?

A. That is correct.

Q. To the west was Section 15?

A. That is correct.

Q. To the east was Section—what was the number there?

A. 13.

Q. Sir?

A. 13.

Q. 13. And to the south was Section 23?

A. Section 23 to the south, that is right.

Q. First you found that all four of those sections were not Indian reservations, but were white-owned sections?

A. Yes, sir.

Q. Section 11 was highly developed with one of the principal hotels in Palm Springs, the El Mirado,

Defendants' Exhibit "O" (Continued)

and with many homes of wealth people, is that not correct? A. That is correct.

Q. Section 15 was developed with the principal motel in Palm Springs, the Desert Inn, and you found it was assessed at a valuation of \$900,000.00, didn't you? A. The Desert Inn property?

Q. Yes.

A. I don't remember whether or not I even checked the assessed valuation of the Desert Inn property.

Q. You found it also had the principal business thoroughfare in Palm Springs, Palm Canyon Drive, Section 15? A. That is correct.

Q. And that it contained many business properties and many homes of wealth people?

A. That is correct.

Q. Section 23 contained the Biltmore Hotel property, one of the finest hotels in the area, at the south end and along the state highway?

A. That is correct.

Q. And contained the Deep Well Ranch, another extensive development?

A. That is correct.

Q. And it contained other developments of a high-class character? A. Yes, sir.

Q. And Section 14 contained the race track and an amusement area, as well as the airport?

A. Yes, and there were some subdivision lands in Section 13 from Alejo Road to McCallum Way, and south of McCallum Way to Baristo Road.

Q. Is it not true, also, Mr. Gallagher, you took

Defendants' Exhibit "O" (Continued)

the assessed values irrespective of whether the particular piece was or was not improved, and you came to what you deemed to be an appropriate and proper total of the assessed value of 11 at so many dollars as the assessed value of that entire section?

A. We are considering the vacant land, aren't we, Mr. Brett? I did not give any weight whatsoever to the assessed value of the improved property.

Q. You took assessed value of vacant land in that Section? A. Yes.

Q. Which was improved with many fine homes?

A. That is correct.

Q. You took the value of 15, which included the business district? A. That is correct.

Q. And you took the assessed value of 13, which included the airport and the race track area?

A. That is correct.

Q. And you took the assessed value of 23, which included the fine hotel, the Deep Well Ranch, and other properties?

A. That is correct, plus—pardon me.

Q. Go ahead.

A. All right. Plus some sales and also some listings.

Q. In other words, you get your figures both from assessments and from some listings and some sales, and arrived at a general value, in your opinion, of these four sections?

A. That is correct.

Q. Then you added the four sections together and you came to a total, didn't you? A. Yes.

Defendants' Exhibit "O" (Continued)

Q. Then you divided by four?

A. That is correct.

Q. And then you determined that Section 14 had 640 acres in it? A. Yes, sir.

Q. And you determined, in your opinion, because Section 14 was in part being used by what you considered not an advantageous use, shacks, and so forth—you learned that, didn't you?

A. Yes.

Q. You depreciated Section 14 to a certain percentage because it had shacks on it?

A. That's right.

Q. And then you took this X, divided by four, and divided that by 640, and arrived at the average value per acre, didn't you?

A. Ultimately, and may I answer——

Q. That is what you did, isn't it?

A. Yes.

Q. Now, Mr. Gallagher, you had also to evaluate Section 26, didn't you? A. Yes, sir.

Q. 26 had the 25- and 40-acre parcels?

A. Yes.

Q. Section 26 had Section 23 above and to the north? A. Yes, sir.

Q. And had a section to the east of it, that was 27? A. 25.

Q. 25. It had a section to the west of it, that was 27? A. Yes, sir.

Q. Was there any section below it?

A. There was. I don't have the number of that section below it.

Q. There was a section here we will mark "X"

Defendants' Exhibit "O" (Continued)

below. You did precisely the same thing in reference to the properties in 26? A. That is true.

Q. Determined in your opinion what the average value of the four surrounding sections was per acre, by first fixing the—based upon assessed values, some sales and some listings, you formed your opinion of the value of that whole section?

A. That is correct.

Q. And then you added the four sections together and divided by four?

A. In this instance, three.

Q. You disregarded this one? A. Yes, sir.

Q. You divided by three and you came to an average acreage value? A. Yes, sir.

Q. You didn't depreciate this property because you didn't consider it had the disadvantageous use, so by dividing by three, you then divided by 640, and came to an acreage value, didn't you?

A. Yes, sir.

Mr. Brett: That's all.

Redirect Examination

Q. (By Mr. Preston): Is that all the factors that entered into the proposition?

A. I mentioned, Judge, I had considered some sales in that area there, what property sold for in those sections, and what property was listed for. Not only the assessed valuations, but also I combined the assessed valuations with listings and also sales, and the balance was—I was satisfied in my mind that I was correct and I was correct in my approach.

Defendants' Exhibit "O" (Continued)

Q. You checked your computations?

A. I did.

Mr. Preston: That's all.

Mr. Brett: That's all. Thank you.

(Witness excused.)

Admitted in evidence 2/7/51.

RESPONDENTS' EXHIBIT "P"

[Public Law 322—81st Congress]

[Chapter 604—1st Session]

[H. R. 5310]

AN ACT

To confer jurisdiction on the State of California over the lands and residents of the Agua Caliente Indian Reservation in said State, and for other purposes.

Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That on and after January 1, 1950, all lands located on the Agua Caliente Indian Reservation in the State of California, and the Indian Residents thereof, shall be subject to the laws, civil and criminal, of the State of California, but nothing contained in this section shall be construed to authorize the alienation, encumbrance, or taxation of the lands of the reservation, or rights of inheritance thereof whether tribally or individually owned, so long as the title to such lands is held in trust by the United States, unless such alienation,

encumbrance, or taxation is specifically authorized by the Congress.

Sec. 2. Notwithstanding any other provision of law or the allotment in severalty to Indians of the Agua Caliente Indian Reservation, and subject to the provisions of section 3 of this Act, no valid and existing permit covering lands located on the reservation, the terms of which have been fully met by the permittee, shall be terminated without the consent of the permittee prior to December 31, 1950.

Sec. 3. The city of Palm Springs in Riverside County, California, with the approval of the Secretary of the Interior, and subsequent to an appropriate resolution adopted by the business committee of the Agua Caliente Band of Mission Indians, giving approval, is hereby granted an easement not to exceed sixty feet in width for public use, and the widening and improvement of Indian Avenue along and upon section 14, township 4 south, range 4 east, San Bernardino base and meridian, in said city, said easement generally following and adjoining the west section line, but within the confines of its middle portion, for the isolation and preservation of the Indian Hot Springs and the palm trees in said area, the center line of said easement shall follow an arc having a radius of one thousand two hundred seventy feet, the center and most easterly portion of the arc being one hundred forty feet east of the quarter section corner of said section 14. Said city also is granted an easement for similar purposes along and upon the westerly ten feet of said section 14, lying within the arc. Said improvements

shall be made at the expense of said city: Provided, That any holder of a valid permit covering land affected by the said widening of Indian Avenue shall be entitled to just compensation from said city of Palm Springs for the detriment suffered, taking into consideration benefits deriving from such improvement.

Approved October 5, 1949.

Admitted in evidence 2/7/51.

RESPONDENTS' EXHIBIT "Q"

[Public Law 904—81st Congress]

[Chapter 1192—2d Session]

[H. R. 9272]

AN ACT

To amend the Act of October 5, 1949 (Public Law 322, Eighty-first Congress), so as to extend the time of permits covering lands located on the Agua Caliente Indian Reservation.

Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That section 2 of the Act entitled "An Act to confer jurisdiction on the State of California over the lands and residents of the Agua Caliente Indian Reservation in said State, and for other purposes", approved October 5, 1949, is amended by striking out "December 31, 1950" and inserting in lieu thereof "December 31, 1951": Provided, That this amendment shall not extend

the duration of any permit which would, according to its own terms, expire on or before December 31, 1951.

Approved December 29, 1950.

Admitted in evidence 2/7/51.

[Endorsed]: No. 13103. United States Court of Appeals for the Ninth Circuit. United States of America and Lee Arenas, Appellants, vs. John W. Preston, Oliver O. Clark and David D. Saltee, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed September 18, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13,103

UNITED STATES OF AMERICA and
LEE ARENAS,

Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and
DAVID D. SALLEE,

Appellees.

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD TO BE PRINTED

The United States of America and Lee Arenas, appellants in the above-entitled case, adopt the statement of points filed in the district court as the statement of points to be relied upon in this Court, and desire that the whole of the record as filed and certified be printed with the following exceptions, with respect to which it is proposed to obtain an order for consideration in original form:

1. The maps and photographs included in Petitioners' Exhibit 14;
2. Petitioners' Exhibits 14-A, 14-B, and 17;
3. Respondents' Exhibits A, B, and C.

4. The maps and photographs included in Respondents' Exhibit J.

Respectfully submitted,

/s/ A. DEVITT VANECH,
Assistant Attorney General,
/s/ ROGER P. MARQUIS,
/s/ JOHN C. HARRINGTON,
Attorneys, Dept. of Justice,
Washington, D. C.

Certificate of Service attached.

[Endorsed]: Filed Sep. 26, 1951. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

MOTION FOR CONSIDERATION OF ORIGINAL EXHIBITS

The United States of America and Lee Arenas, appellants in the above-entitled cause, move this Court for an order authorizing the consideration of the maps and photographs included in Petitioners' Exhibit No. 14 and Respondents' Exhibit J, and in their entirety Petitioners' Exhibits Nos. 14-A, 14-B and 17, and Respondents' Exhibits A, B and C, even though said exhibits and parts of exhibits are not included in the printed record, such consideration to be the same as if said exhibits had been designated for inclusion in the printed record.

Respondents' Exhibit C is the Land Use Ordinance of the City of Palm Springs, California, and

the other exhibits or parts of exhibits are either maps or photographs of the area involved. They were designated as part of the record on appeal so that they would be available for examination or reference in this Court. However, it is not believed that they are of sufficient materiality to justify the expense of reproduction in the printed record.

/s/ A. DEVITT VANECH,
Assistant Attorney General,
/s/ ROGER P. MARQUIS,
/s/ JOHN C. HARRINGTON,
Attorneys, Dept. of Justice,
Washington, D. C.

Certificate of Service attached.

[Endorsed]: Filed Sep. 27, 1951. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

ORDER FOR CONSIDERATION OF ORIGINAL EXHIBITS

Upon consideration of the motion filed by appellants for an order authorizing consideration of the maps and photographs included in Petitioners' Exhibit No. 14 and Respondents' Exhibit J, and consideration in their entirety of Petitioners' Exhibits Nos. 14-A, 14-B and 17, and Respondents' Exhibits A, B and C, and good cause appearing therefor, it is hereby ordered that said exhibits and parts of exhibits shall be used and considered by this Court upon said appeal with the same force and effect as

though they were incorporated in and made a part of the printed transcript of record.

September 26, 1951.

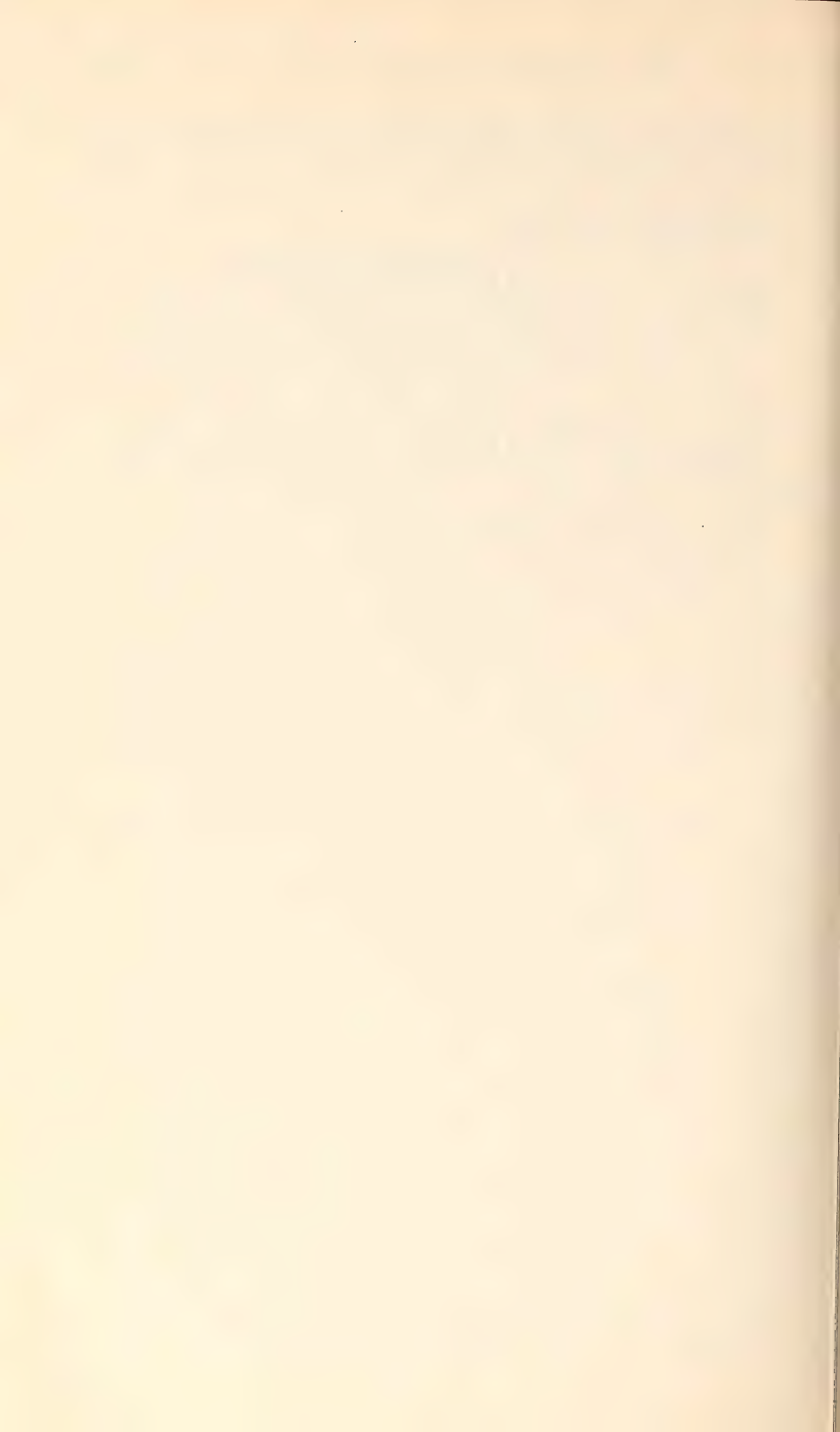
/s/ CLIFTON MATHEWS,

/s/ HOMER BONE,

/s/ WM. E. ORR,

Circuit Judges.

[Endorsed]: Filed Sep. 27, 1951. Paul P. O'Brien,
Clerk.



No. 13103

**In the United States Court of Appeals
for the Ninth Circuit**

**UNITED STATES OF AMERICA AND LEE ARENAS,
APPELLANTS**

v.

**JOHN W. PRESTON, OLIVER O. CLARK AND DAVID D.
SALLEE, APPELLEES**

**UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION**

BRIEF FOR THE UNITED STATES AND LEE ARENAS

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Washington, D. C.*

FILED

MAR - 6 1952

**PAUL P. O'BRIEN,
CLERK**

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In the United States Court of Appeals for the Ninth Circuit

No. 13103

UNITED STATES OF AMERICA AND LEE ARENAS,
APPELLANTS

v.

JOHN W. PRESTON, OLIVER O. CLARK AND DAVID D.
SALLEE, APPELLEES

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION

BRIEF FOR THE UNITED STATES AND LEE ARENAS

OPINION BELOW

The district court did not write an opinion. Its findings of fact and conclusions of law appear in the record at pages 67-74. The opinion of this Court on a prior appeal is reported at 181 F. 2d 62. This Court's opinion on a prior appeal in the companion case of *United States and Eleuteria Brown Arenas v. Preston et al.*, presently pending on appeal as No. 12962, is reported at 181 F. 2d 69.

(1)

JURISDICTION

This suit was originally brought under the Act of August 15, 1894, 28 Stat. 286, 305, as amended, 25 U. S. C. sec. 345,¹ to determine an Indian's right to certain allotments. After judgment was entered for the Indian, his attorneys filed a petition in the case for a supplemental decree making an allowance for attorney fees and expenses and imposing a lien upon the allotments to secure payment thereof. Upon appeal, this Court affirmed the jurisdiction of the district court to fix attorney fees, impose a lien and sell the allotted lands, but reversed and remanded the case with instructions as to the proper manner to fix the fees. A judgment fixing fees was entered April 6, 1951 (R. 75-80). Motions for a new trial and to amend findings of fact, conclusions of law and judgment were filed on April 16, 1951 (R. 80-83) and denied on May 22, 1951 (R. 83-87). Notice of appeal was filed July 20, 1951 (R. 87-88). The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1291.

QUESTIONS PRESENTED

1. Whether it is appropriate, under the circumstances of this case, that this Court reexamine its prior holding that in a proceeding under the 1894 Act, brought by an Indian to determine his right to

¹The jurisdictional provisions of this Act were incorporated in the Judicial Code, sec. 24 (24), 28 U. S. C. sec. 41 (24) (1940 ed.), which was identical in scope with the 1894 Act as amended. *First Moon v. White Tail*, 270 U. S. 243, 245 (1926). They are now codified in 28 U. S. C., sec. 1353. For brevity these provisions will be hereinafter referred to as the 1894 Act.

certain allotments, the district court had jurisdiction to impress a lien upon the restricted allotments to secure payment of an award of attorney fees and expenses of suit, and to enforce such lien by ordering a sale of the property.

2. Whether the values found by the district court for the Indian's interest in the various parcels of the allotments are excessive and not supported by competent evidence.

3. Whether the district court erred in denying the motion to amend findings of fact, conclusions of law and judgment to provide for attorney fees measured by a percentage of the value of the allotments up to but not exceeding the amount awarded.

STATUTE INVOLVED

The Act of August 15, 1894, 28 Stat. 286, 305, as amended by the Act of February 6, 1901, 31 Stat. 760, 25 U. S. C., sec. 345, is as follows:

All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within

their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, * * *.

STATEMENT

This is an appeal from a judgment (R. 75-80) awarding \$90,000 as fees to the attorneys who represented an Indian in a suit under the 1894 Act to adjudicate his claim to allotments, and imposing a lien upon the allotments to secure the payment of the award.² The judgment was entered after further proceedings directed by this Court. *Arenas v. Preston*, 181 F. 2d 62 (C. A. 9, 1950). The background may be outlined as follows:

As a result of litigation which culminated in this Court's decision in *United States v. Arenas*, 158 F. 2d 730 (C. A. 9, 1946), certiorari denied 331 U. S. 842, it was determined that Lee Arenas was entitled to trust patents for certain allotments, totaling 94 acres, in Palm Springs, California. On October 24, 1947,

² The judgment also awards \$258.67 as reimbursement for expenses of the litigation advanced by appellee attorneys (R. 76-77). On this appeal no question is raised as to this portion of the judgment except insofar as the \$258.67 is made the basis for the lien impressed upon the allotted lands.

appellees filed in the allotment proceeding their petition for a supplemental decree for attorney fees and expenses incurred, the impressment of a lien on the allotments to secure the payment thereof, and other relief (R. 3-14). On the same day an order was issued directing Lee Arenas to show cause why the relief sought should not be granted (R. 14-15). The United States, appearing specially, moved to dismiss the show cause order insofar as it and the underlying petition were directed toward the issuance of any order affecting in any way the restricted allotment or the management thereof, on the grounds that, since title to the lands was in the United States, it was an indispensable party and had not consented to such jurisdiction (R. 16-18). On December 31, 1947, the motion to dismiss was denied (R. 27). Thereafter, the United States, appearing specially on its own behalf and generally on behalf of Lee Arenas, filed an answer (R. 28-39), alleging its governmental interest in the enforcement of the restrictions against alienation of the allotments (R. 28-29), and praying that, if appellees were entitled to any relief, it be limited to a personal money judgment against the Indian (R. 38).

After trial, the court (Judge Mathes) on March 31, 1948, rendered its oral ruling (R. 378-386), and on May 3, 1948, filed its findings of fact, conclusions of law and judgment (R. 47-62), awarding to appellee attorneys 22½% of the value of the allotments as fees, and impressing a lien upon the allotted lands to secure payment of the award. The United States appealed on behalf of itself and Arenas, raising the

issue as to the court's jurisdiction to impress a lien upon the restricted lands to secure the payment of compensation to the attorneys. This Court affirmed the jurisdiction of the district court to impress a lien upon the allotted lands. *Arenas v. Preston*, 181 F. 2d 62, 63-67 (C. A. 9, 1950). However, in view of the interest of the United States in the trust patent allotment, it was held to be reversible error that the court had fixed the compensation due to the attorneys in terms of a percentage of the value of the allotments unrestricted by any interest of the United States. *Arenas v. Preston*, 181 F. 2d 62, 67 (C. A. 9, 1950); *United States v. Preston*, 181 F. 2d 69 (C. A. 9, 1950). In so holding this Court stated (181 F. 2d at pp. 67-68):

The district court should have proceeded expressly to fix the dollar value of the services performed as the basis for the sum secured by the lien and in so doing should have considered and determined the value of the thing secured by the litigation, namely, the reasonable value of the Indian's interest in the allotted land under the trust patent, as one of the elements to be taken into consideration.

and remanded the case "with instructions to determine the sum of money for which amount the lien against the allotted property is to be impressed," the judgment to stand affirmed when such determination is made, except as to proper assignments of error which may be claimed to have occurred in the determination ordered. A petition for a writ of certiorari filed by the Government and Arenas was denied

(*United States v. Preston*, 340 U. S. 819 (1950)), and the case came before the district court for further proceedings in February, 1951.

At the further proceedings it was stipulated that all the evidence introduced in the allotment proceeding and at the first hearing on attorney fees should be deemed as being before the court (R. 129, 388-389, 393), and in addition thereto further testimony was presented. The evidence as to the value of the allotments may be summarized as follows:

The allotments consist of Lots 46 and 47, each containing two acres, in Section 14; Lots 39 and 40, each containing five acres, in Section 26; and two parcels of 40 acres each in Section 26 (R. 77-78). All these lots and parcels are surrounded in whole or in part by lands allotted in severalty to other members of the Palm Springs tribe (R. 392, 549-550, 627-628). In 1949, Congress enacted legislation making all the Indian lands in the City of Palm Springs subject to the municipal zoning regulations (R. 652). Section 14 is surrounded by sections (Sections 11, 13, 15, and 23) having such major developments as the business district, hotels, apartment houses, estates and luxurious homes, municipal buildings, race track, golf course, and tennis club (Petitioners' Exhibit No. 14, p. 9). It is made up entirely of Indian lands and is uniformly described as a slum area because of its poor development (R. 159, 580-581, 610-611; Petitioners' Exhibit No. 14, pp. 8-9). Streets running through the section are no more than dirt paths, and the Indians have leased the lands to persons of low income

who have erected shacks in a helter-skelter fashion without even regard to street lines (R. 574, 580-581, 611; Petitioners' Exhibit No. 14, pp. 8-9, 26). Although water and other utilities are available to the section, the Indian lands have no sewerage system and the sanitation facilities are faulty (Petitioners' Exhibit No. 14, pp. 7, 8, 16). Lots 46 and 47, allotted to Arenas, are located on a dirt road, and each contains about 12 shacks (R. 580-581). They are at least one-quarter of a mile from any street in an area zoned for commercial use (R. 415-416), and are themselves zoned for single family residences costing from \$15,000 to \$25,000 on lots of 7,500 square feet (R. 163-164; Petitioner's Exhibit No. 14, pp. 7, 17).

Section 26 is largely undeveloped, but is surrounded on three sides by well developed sections (Petitioners' Exhibit No. 14, pp. 9, 10). The two 5-acre parcels allotted to Arenas have a frontage of 660 feet on Palm Canyon Drive, a main thoroughfare, across the street from a high-class residential subdivision (R. 585, 587). They are now utilized for small cabin sites, trailer parks and cheap shacks, owned by tenants, and have no defined street system (R. 583-584, 612-613). They are presently zoned for single family residences on lots of 10,000 square feet for a depth of 150 feet from Palm Canyon Drive, and for use as a trailer park for the balance of the acreage (R. 613; Petitioners' Exhibit No. 14, p. 17). The remainder of the allotted lands in Section 26 (80 acres) is classified as raw desert acreage, subject to floods, of which approximately 30 acres are zoned for

trailer park use, while the balance of 50 acres is zoned for guest ranch use (R. 615-616; Petitioners' Exhibit No. 14, p. 17).

As in the companion case of *United States and Eleuteria Brown Arenas v. Preston, et al.*, No. 12962, there was a difference of opinion as to whether the allotted lands should be valued with or without regard to the restrictions against alienation (R. 154-156, 172-173, 184-186, 194, 388, 391). Appellees' witness, Joseph A. Gallagher, estimated that the fee value of the lands was \$1,047,000 on the basis of a valuation of \$20,000 per acre for the lots in Section 14, \$13,200 per acre for the 5-acre lots in Section 26, and \$12,000 per acre and \$9,500 per acre for various parts of the remaining 80 acres in Section 26 (Petitioners' Exhibit No. 14, pp. 1-2, 15). This estimate was made on the assumption that the property was free from the restrictions against alienation (R. 154-156, 400-401, 406-407). It was his opinion that the trust patent interest of the Indian would have the same value if the trust were to expire in 1952, but that if the President had the power to extend the trust period for 10 years or longer, the value of the trust patent interest would be 40% less than the value of the fee or approximately \$628,200 (R. 184-186, 194). His appraisal was made in December of 1947, and he had not returned to the Palm Springs area to make any appraisals since that time (R. 636, 637). On being recalled for cross examination at the second trial in February 1951, he testified that his opinions as to

values in 1951 would be the same as those expressed in his 1947 report (R. 429, 438).³

Gallagher reached his opinions as to the values of the various parcels by a process of averaging the values of lands in adjoining sections (R. 116-117, 424, 641, 649-651; Petitioners' Exhibit No. 14, pp. 19-20, 22), that is, he first determined values for all properties, chiefly small lots, in the well-developed sections adjacent to the Indian sections, added the values for properties in the sections to obtain the total value of each section, divided the sum of the section values to obtain the value of an average section, discounted such average value to obtain the value of the Indian sections, and then divided this result by 640 to get the average value per acre in the Indian sections (Sections 14 and 26). In determining the values of the individual properties in the adjoining sections Gallagher multiplied the assessed valuations of land and improvements by five and combined these values with some selling prices and listings (R. 174-177, 640-641). And in estimating the value of Lots 46 and 47 in Section 14, he assumed not only that these lots would be free of restrictions, but also that all the lands in the section would be similarly without restrictions against alienation and that the unsightly conditions would be cleaned up so that the section could be developed along the lines in the adjoining sections (R. 154-162, 167, 411-412, 413-415).

³ At the first trial in 1948, Gallagher had testified that in his opinion values would be 28% less in 1952 because of an apparent leveling in real estate values (R. 188-189; see Petitioners' Exhibit No. 14, p. 12).

He also assumed that variances would be made in the zoning regulations to permit the highest and best use of the land (R. 165–166, 408, 421). He could not cite an instance of the sale of acreage in the Palm Springs area to support his valuations of the various parcels in the allotments at from \$9,500 to \$20,000 per acre (R. 177–181, 426–428), and he could only refer to an offer to sell some acreage in Section 11 at \$6,500 per acre, which offer the potential purchaser refused to accept (R. 181).

At the first trial appellees also presented Benton Beckley as a valuation witness (R. 196–204). He had collaborated with Gallagher in the preparation of the appraisal report (Petitioners' Exhibit No. 14) and agreed that the reasonable market value of the allotted lands was \$1,047,000 (R. 198). He had the same opinion as to the effect of the trust patent on value (R. 199), and in arriving at his estimates used the same "average" approach with assessed valuations as the basis (R. 199–200). He also assumed that the Indian lands could be used for business purposes (R. 201). He likewise could not cite any sales of acreage to support his valuations of the allotted lands, but could only refer to an offer to sell acreage at \$7,000 per acre (R. 202–204). This witness did not testify at the second trial.

At both trials appellants moved to strike the valuation opinions of Gallagher and Beckley because of their reliance upon improper considerations, erroneous assumptions, and artificial mathematical computations (R. 40–41, 63–65). These motions to strike were denied (R. 66, 214), the court being of the

opinion that appellants' objections went to the weight rather than the admissibility of the opinions (R. 210, 211-214).

Appellants also presented two expert witnesses on valuation, Bernard G. Evans and Donald C. Jones. Evans, who did not testify at the second trial, estimated that in 1948 the fair market value of the fee title of the allotments was \$211,500, based upon valuations of \$6,250 per acre for the lots in Section 14, \$30 per front foot for the street frontage and \$6,000 per acre for the balance of the 5-acre lots in Section 26, and an average of \$1,500 per acre for the remaining 80 acres in Section 26 (R. 604-605, 611, 613-614, 616-617). In his opinion the market value of the Indian's interest in the lands under the trust patent would not exceed 25% to 30% of the value of the fee, or a maximum value of \$63,450 (R. 606).

At the first trial, Jones estimated that as of 1948 the market value of the fee title to the allotments was \$245,000, based upon valuations of \$6,400 per acre for the lots in Section 14, \$8,000 per acre, or \$35 per front foot and \$7,350 per acre for the balance, for the 5-acre lots in Section 26, and an average of \$1,750 per acre for the remaining 80 acres in Section 26 (R. 575-576, 587-588). In his opinion the value of the Indian's interest under the trust patent in 1948 would be 20% of the fee value, or \$50,000 (R. 594-595). At the second trial, he estimated that the value of the trust patent in 1948 would be \$87,800, the increase being due to increases in his trust patent valuations for the lots in Section 14 and the 5-acre lots in Section 26 because of the possibility of leasing

the lands without a 30-day cancellation clause (R. 433, 436). In his opinion the values in 1951 at the time of the second trial for both the fee title and trust patent title would be approximately 10% less than the 1948 values because of a falling off in the real-estate market in Palm Springs (R. 436-438).

On February 16, 1951, the court orally fixed the attorney fees at \$90,000 (R. 67), and on April 5, 1951, filed findings of fact, conclusions of law and judgment (R. 67-80).⁴ The court found (Finding IX, R. 71) that the reasonable market value of the fee simple title of the allotments was the same as the reasonable market value of the Indian's interest in the allotted lands, and that (Finding VIII, R. 70-71) the reasonable market value of the Indian's interest in the allotted lands under the trust patent was \$412,000.00. The separate values found for the 2-acre lots in Section 14 and the 5-acre lots in Section 26 were exactly the same as estimated for these parcels by appellees' witness Gallagher (R. 70-71; Petitioners' Exhibit No. 14, p. 15). The judgment provided that payment of the fees awarded would be secured by a lien upon the allotted lands, including "the entire interest, if any, in said lands in the hands of the United States of America" (R. 77), and that, if payment was not made within six months, the lands were to be sold under court order (R. 78-79).

On April 16, 1951, appellants filed a motion for new trial, and in the alternative a motion to amend findings of fact, conclusions of law and judgment to pro-

⁴ Although filed on April 5, 1951, the judgment was not entered until April 6, 1951 (R. 80).

vide that, in lieu of an award of \$90,000, the compensation of appellee attorneys be fixed at "a sum equivalent to 22½ percent of the reasonable value of the plaintiff's interest and estate in the allotted lands under the trust patent * * * up to, but not exceeding, the sum of \$90,000" (R. 80-83).⁵ On May 22, 1951, these motions were denied (R. 83-86), the denial of the motion to amend findings, etc., being on the ground that under this Court's mandate the court had no power to make the requested amendment over the objection of appellees (R. 85-86, 457-458, 459, 462). This appeal followed (R. 87-88). On October 1, 1951, appellees' motion to affirm the judgment was denied.

SPECIFICATIONS OF ERROR

On this appeal, appellants rely upon the following specifications of error (see R. 88-90, 656):

1. The district court erred in assuming jurisdiction to impress a lien upon the restricted allotments to secure the payment of attorney fees and expenses of suit, and to enforce such lien by ordering a sale of the property.

2. The values found for the Indian's interest under the trust patent in the various parcels of the allotments (Finding VIII, R. 70-71) are excessive and not supported by competent evidence. This speci-

⁵ The original award of attorney fees, which was reversed by this Court, was in the amount of 22½% of the value of the allotted lands (R. 59-60), with no finding as to the land value. The present award of \$90,000 is the rounded off equivalent of 22½% of the land value of \$412,000 found by the court (R. 71), i. e., 22½% of \$412,000 equals \$92,700.

fication depends in part upon Specifications Nos. 3, 4, 5, and 6.

3. The finding (Finding IX, R. 71) that the value of the fee simple title to the lands involved was the same as the value of the Indian's interest therein is not supported by the evidence and is contrary to the evidence in the case.

4. The district court erred in basing the award of compensation upon the market value of the full fee title to the lands involved rather than upon the market value of the Indian's interest therein. This question as to whether the value of the fee title or the value of the trust patent interest should be considered in the determination of attorney fees was presented at both hearings. At the first hearing it was raised as follows during cross-examination of appellees' witness Gallagher (R. 155-156):

Q. (By Mr. BRETT). In other words, you did not give consideration to the fact that that particular property, as well as the other parcels which are the subject matter here, are vested in the United States of America and that there are very definite legal restrictions upon either conveyance or encumbrance of the property?

Mr. CLARK. Just a minute. I desire to interpose an objection to that question upon the ground that it assumes that the title is in the United States of America.

The COURT. Sustained. Did you assume that your hypothetical buyer would acquire an unimpaired fee simple title to the property?

The WITNESS. Yes, sir.

Mr. BRETT. Did I understand your Honor sustained the objection?

The COURT. I sustained the objection to the question. I think the witness has testified to what you want to know. He says that he assumed that this hypothetical buyer would acquire an unimpaired fee simple title to the land. I take it that throughout we are dealing with the full ownership, aren't we?

The WITNESS. Yes, sir.

The COURT. That is what you dealt with?

The WITNESS. Yes, sir.

and at R. 172-173:

The COURT. Mr. Brett asked some questions yesterday to which I sustained objection due to the form of the question, without suggesting they could be reached in another manner. I had in mind asking Mr. Gallagher if his opinion would be different if he assumed that there was such a trust patent.

Mr. BRETT. I expect to go into that, your Honor.

The COURT. Very well.

Mr. BRETT. However, of course, I do not want to preclude in any way the court's questioning.

The COURT. No. I just wanted you to know that I was not precluding that type of cross examination in my ruling.

And the court itself questioned Mr. Gallagher as to the effect of the trust patent on his estimates of value (R. 184-185).

At the beginning of the second trial in discussing the decision of Judge Cavanah in the *Eleuteria*

Arenas case (No. 12962) the following occurred (R. 388):

The COURT. Do you gentlemen feel that Judge Cavanah properly complied with the mandate?

Mr. BRETT. Unfortunately, the Government would have to answer "No," your Honor.

The COURT. Is that because of the valuations or the amounts?

Mr. BRETT. In applying the mandate, we feel that he erred in that it is quite apparent from his opinion that in valuing the land, he evaluated it as fee simple, as distinguished from valuing the Indian's interest.

Mr. PRESTON. It is our contention that that is the only criterion, your Honor.

And at R. 391, Mr. Brett stated:

In connection with this legal issue which Judge Cavanah has resolved and which your Honor will have to resolve, I believe that we have treated that in the memoranda and I do not want to take any additional time to argue the point.

My purpose will be this, your Honor: I have Mr. Jones here and I expect to interrogate him on the value of the Indian's interest with a hypothetical question on one of two bases. If Judge Preston objects to that and your Honor rules against the Government that it is not admissible, then I would like to adduce it as an offer of proof so I will have the record.

And at the close of the hearing appellants moved to strike the opinion of Gallagher as to the market value in fee of the allotted lands in part on the

grounds that the fee value was immaterial, irrelevant, and incompetent (R. 63-64). This motion was denied (R. 66).

5. The court erred in denying the motions to strike the opinions of value expressed by petitioners' witnesses Gallagher and Beckley (R. 40-41, 63-65). At the first hearing the motion (R. 40-41) was addressed to the opinions of both Gallagher and Beckley and was on the ground "that both of said witnesses have inextricably included within the matters upon which they based their said opinions, certain matters which were wholly incompetent and inadmissible for such purpose, to wit:

1. The use of the assessed value as evidence of market value;

2. The use of the assessed value of the land and improvements indiscriminately as evidence of market value;

3. The use of an artificial mathematical calculation (multiplying assessed value by 5) as evidence of market value;

4. The total ignoring of zoning restrictions which, by law, would prevent use of the subject properties for business purposes, by assuming as an integral part of their basis for their opinions as to market value, alleged comparable properties which were zoned for business;

5. That in arriving at said opinions as to market value, each of said witnesses fixed such value upon the basis of an adaptability for use for which said properties were not then available and which use was then prohibited by law.

This motion was denied (R. 214). The entire reporter's transcript of the first hearing was considered as

given before the court at the second hearing (R. 388–389) and the hearing was treated as not having been interrupted by the prior appeal (R. 393). Beckley did not testify at the second trial and the motion to strike (R. 63–65) was addressed to the opinions of Gallagher only. This motion was made on the same ground as the previous motion, and in addition on the grounds that the market value of the fee simple title was immaterial, irrelevant and incompetent (R. 64–65). This motion was denied (R. 66).

6. The court erred in denying the Government's motion for new trial made on the grounds that the evidence was insufficient to justify the findings and that there were errors of law (R. 80–81).

7. The court erred in denying the Government's alternative motion (R. 81–83) to amend findings of fact, conclusions of law and judgment to provide for recovery measured by a percentage of the value of the allotment, up to but not exceeding the sum awarded.

SUMMARY OF ARGUMENT

I

Although this Court's prior holding that the district court had jurisdiction to impose a lien upon the restricted allotment is law of the case, there is no restriction upon this Court's authority to review the holding. *United States v. Fullard-Leo*, 156 F. 2d 756, 757 (C. A. 9, 1946), affirmed, 331 U. S. 256 (1947). Under the circumstances, and in view of new considerations advanced here for the first time, review is appropriate.

On the prior appeal in this case it was recognized that no lien could be impressed upon the allotment unless Congress had in some way indicated its consent thereto, and in reliance upon *United States v. Equitable Trust Co.*, 283 U. S. 738 (1931), and the principle that legislation must be construed most favorably to the Indian, it was held that such consent had been granted by implication. But just as in the case of any other special jurisdictional act waiving the sovereign immunity, a jurisdictional act for the benefit of Indians "is to be strictly construed and may not by implication be extended to cases not plainly within its terms." *Klamath Indians v. United States*, 296 U. S. 244, 250 (1935). Moreover, it is plain that the circumstances here present could not justify a finding of implied consent. In addition to those circumstances enumerated in our brief on the prior appeal, which we believe prevent any finding by implication that Congress had intended by the 1894 Act that attorneys should be compensated out of the restricted allotments, it may be pointed out that in numerous analogous situations involving allotments of the Five Civilized Tribes, Congress has passed special legislation denying to attorneys any lien upon the Indian lands, and has made other provisions for their compensation. Likewise, in cases arising under the 1894 Act Congress has not hesitated to make arrangements for compensating attorneys. These instances, rather than indicating any consent that the allotments be subject to a lien enforceable by the courts, demonstrate that Congress has re-

tained in itself full control over the disposition of the Indian lands.

II

It is apparent from the findings of the court that the amount of attorney fees was determined in consideration of the fee simple value of the allotted lands rather than the value of the Indian's interest therein under the trust patent, which in itself is a more liberal measure of compensation than the equities demand. Although the witnesses were in agreement that the value of the trust patent interest was at least 40% less than the value of the fee title, the court found that such values were the same. Thus, the court's findings as to the value of the Indian's trust patent interest are actually findings as to the fee value.

The findings as to the value of the 2-acre and 5-acre lots can be supported only by the highest testimony as to their fee value, which is admittedly substantially greater than the trust patent value. Hence, it is plain that these findings are erroneous and that the award of fees based thereon must be reversed. Although the findings as to the value of the 80-acre parcels are within the range of the testimony, these findings, as well as the findings as to the 2-acre and 5-acre lots, are subject to attack on the ground that the only evidence which can support the findings was incompetent and should have been stricken on appellants' motions. The only evidence which can be said to support the findings were opinions based upon a process of averaging values

of small lots in adjoining, well-developed sections to obtain an average price per acre for land in the Indian sections. In determining the values of the lots in the adjoining sections the witnesses relied chiefly upon assessed valuations of land and improvements and listings. Plainly, opinions based upon such incompetent factors and an arbitrary method of averaging are of no probative value and should not have been considered. Moreover, these witnesses assumed not only that the lands in question would be without restrictions against alienation, but also that all other lands in the Indian sections were similarly free of restrictions and available for development similar to that in the adjoining sections. They also assumed that variances in the zoning regulations would be made to permit the highest and best use of the land, i. e., for business and multiple-dwelling use rather than only for single family dwellings, as presently zoned. Clearly, such considerations vitiate their opinions.

III

In this case the range of the valuation testimony was unusually wide, and the findings as to value as to some of the parcels were in the exact amount of the highest testimony, the findings as to the other parcels being substantially greater than appellants' testimony. Therefore, because of the possibility that the proceeds of a sale would be exhausted after payment of the expenses of sale and the award of attorney fees, leaving little or nothing for the Indian, appellants filed a motion to amend the findings of

fact, conclusions of law and judgment, to provide for an award in the alternative, i. e., either \$90,000 or 22½% of the value of the lands, whichever was the lesser. The district court was impressed by the equity of the proposed amendment, but denied the motion on the ground that under this Court's mandate the court below had no power to grant the relief sought. It is submitted that this Court's mandate should not be so construed, and that in any event this Court has the power to grant the relief. There can be no question as to the equity of the proposed amendment.

ARGUMENT

I

Under the circumstances of this case, it is appropriate that this court reexamine its holding that the district court had jurisdiction to impress a lien upon the restricted allotments to secure the payment of attorney fees and expenses of suit, and to enforce such lien by a sale of the restricted property

On the prior appeal in this case, this Court held that, by virtue of the general equity jurisdiction of the court below, the restricted allotments could be impressed with a lien to secure the payment of attorney fees and necessary expenses of the litigation (*Arenas v. Preston*, 181 F. 2d 62, 63-67 (C. A. 9, 1950)). This decision constitutes the "law of the case." However, an undersanding of the issues as to the amount of the fees awarded requires an understanding of the ground upon which any award is justified. In that connection, while we will not, of course, repeat the arguments made upon the previous appeal, we deem it appropriate to call to the Court's attention considerations which indicate

a lack of authority to impress a lien upon and to sell allotted lands for the purpose of insuring payment of the attorney's fees; since authority exists to re-examine the matter if this Court is so advised. *United States v. Fullard-Leo*, 156 F. 2d 756, 757 (C. A. 9, 1946), affirmed 331 U. S. 256 (1947).

The previous opinion recognized that, in view of the Government's interest in the restricted allotment, no lien could be impressed thereon unless Congress had in some way indicated its consent (*Arenas v. Preston*, 181 F. 2d 62, 66-67 (C. A. 9, 1950)). And upon the authority of *United States v. Equitable Trust Co.*, 283 U. S. 738 (1931), it was found that such consent had been granted by implication. However, inasmuch as the jurisdiction of the court below depended upon a special jurisdictional act waiving the sovereign immunity from suit, whereas the finding of an implied consent in the *Equitable Trust* case was based upon the invocation of the court's jurisdiction by the United States as plaintiff, it is submitted that, for the reasons detailed in our opening brief on the prior appeal (pp. 17-20, 26-27), a finding of consent by implication in the instant case cannot be supported. The principle that legislation is to be construed most favorably to the Indian does not, as the previous opinion seems to indicate, create an exceptional situation but, just as in the case of any other special jurisdictional act waiving the sovereign immunity, a jurisdictional act for the benefit of Indians "is to be strictly construed and may not by implication be extended to cases not plainly within its terms." *Klamath Indians v. United States*, 296

U. S. 244, 250 (1935); *Blackfeather v. United States*, 190 U. S. 368, 376 (1903); cf. *Shoshone Indians v. United States*, 324 U. S. 335, 337 (1945).⁶

Moreover, it is plain that the circumstances here present could not justify a finding of implied consent. In our opening brief (pp. 13-15, 19-26) and in our reply brief (pp. 4-6) on the prior appeal we pointed out many of the circumstances, such as the nature of the restrictions on the allotments, the strong governmental policy to preserve Indian allotments, and the practice of Congress in making specific provisions for the payment of attorneys in suits against the Government, all of which militate against a finding that Congress had impliedly consented that in suits under the 1894 Act the allotments could be impressed with a lien to secure the compensation of attorneys. This Court found these circumstances to be outweighed by the reasoning that, inasmuch as the Indian litigant would most likely be without the means to meet the necessary expenses of suit, "Congress could not have intended to commit the subject to its courts with any paralyzing limitation but, in committing the subject to its courts it intended them to fully exercise their general equitable jurisdiction." *Arenas v. Preston*, 181 F. 2d 62, 66-67 (C. A. 9, 1950). Reliance was primarily placed upon *United States v. Equitable Trust Co.*, 283 U. S. 738 (1931) which involved Jackson Barnett, a member of one of the Five Civilized Tribes. But it is clear from contemporary congressional action relating to allot-

⁶ The question whether such an exception existed was not raised or discussed by the parties in their briefs on the former appeal.

ments to members of the Five Civilized Tribes that Congress could not have intended to permit the impressment of liens upon and the sale of lands allotted to Indians to assure the payment of attorneys' fees.

While the same general Indian policy applied to the Five Civilized Tribes as to other Indians, those tribes were excluded from the coverage of the 1894 Act and were the subject of separate legislation. One of the allotment problems that arose in allotting the lands of the Five Civilized Tribes was the question whether Choctaw Indians who had remained in Mississippi should participate in the distribution of Choctaw lands in Oklahoma. Many of the Mississippi Choctaws contracted with attorneys to prosecute their claims in consideration of a fee of one-half of their interests in the allotments that might be secured. When the existence of these contracts was brought to the attention of Congress, it was provided by the Act of May 31, 1900, 31 Stat. 221, 237, that "all contracts or agreements looking to the sale or incumbrance in any way of the lands to be allotted to said Mississippi Choctaws, shall be null and void." See *Winton v. Amos*, 255 U. S. 373, 380-381, 386-387 (1921). And in 1914, Congress enacted legislation with respect to attorney contracts with all members of the Five Civilized Tribes for compensation for services in prosecuting applications for enrollment as citizens in such tribes, such citizenship being the requisite for an allotment of the tribal lands. By the Act of August 1, 1914, 38 Stat. 582, 601, 25 U. S. C. sec. 86, 18 U. S. C. sec. 439, it was provided that all such contracts were null and void unless the

consent of the United States had previously been given; that the receipt of any moneys from any applicants for citizenship was a criminal offense; and that lands allotted to such applicants should not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which the particular allotment could be lawfully alienated. Again, in authorizing per capita payments to members of the Five Civilized Tribes, Congress consistently declared that such payments would be exempt from any lien for attorney fees. Act of August 1, 1914, 38 Stat. 582, 599, 601; Act of May 18, 1916, 39 Stat. 123, 146-147; Act of May 25, 1918, 40 Stat. 561, 580; Act of June 30, 1919, 41 Stat. 3, 22. Thus, Congress has, whenever occasion has required any intercession, steadfastly declared that, at least as far as members of the Five Civilized Tribes are concerned, the allotments were not to be used to compensate attorneys for their services in securing the lands for the Indians. Thus, it is clear that while the award of attorneys' fees under the peculiar circumstances of the *Equitable Trust* case did not violate any policy of Congress, the award of such fees for services in securing an allotment is expressly contrary to that policy.

Adoption of the Government's position does not mean that attorneys who have successfully prosecuted allotment claims of indigent Indians are without hope of receiving compensation. In those cases where adjustment cannot be made by the Secretary of the Interior, Congress has always been solicitous that the attorneys obtain relief. By the Act of April 26, 1906,

34 Stat. 137, 140, and the Act of May 29, 1908, 35 Stat. 444, 457, the Court of Claims was given jurisdiction to adjudicate the claims of attorneys for services and expenses incurred in furthering the claims of the Mississippi Choctaws, the judgment to be paid from funds due to such Choctaws as individuals from the United States. See also Act of March 3, 1903, 32 Stat. 982, 994-995 (providing for payment to attorney for loyal Creeks from the moneys awarded); Act of July 1, 1902, 32 Stat. 641, 650 (providing for payment of attorneys of Chickasaw freedmen from the Treasury); Act of June 21, 1906, 34 Stat. 325, 340 (authorizing Court of Claims to determine claims of attorneys for intermarried whites of Cherokee Nation and to designate funds held by the United States from which payment should be made); Act of May 29, 1908, 35 Stat. 444, 451 (authorizing Court of Claims to determine claims of attorneys for services to Choctaw and Chickasaw freedmen in allotment claims). And on many occasions in providing for cash payments in lieu of allotments or for per capita payments to members of the Five Civilized Tribes, Congress has authorized the Secretary of the Interior to investigate the claims of attorneys and to allow compensation from the funds. Act of August 1, 1914, 38 Stat. 582, 600; Act of May 18, 1916, 39 Stat. 123, 146-147; Act of May 25, 1918, 40 Stat. 561, 579-580; Act of June 30, 1919, 41 Stat. 3, 22. Indeed, there are many instances where Congress has made appropriations for payment to attorneys or to reimburse persons who had paid attorneys for Indians in a wide variety of litigation. See Act of May 31, 1900, 31 Stat. 221,

241; Act of May 27, 1902, 32 Stat. 245, 267; Act of March 3, 1903, 32 Stat. 982, 1000-1001; Act of March 3, 1905, 33 Stat. 1048, 1063; Act of June 30, 1906, 34 Stat. 634, 656; Act of March 3, 1911, 36 Stat. 1058, 1065; Act of August 24, 1912, 37 Stat. 518, 533.

Likewise, in cases arising under the 1894 Act Congress has not been hesitant in making arrangements for payment to attorneys who successfully prosecuted claims for allotments on behalf of Indians who were not able to pay the attorneys with personal funds. By the Act of June 30, 1913, 38 Stat. 77, 98, Congress appropriated funds to reimburse the attorneys, who had been engaged in *Sully v. United States*, 195 Fed. 113 (C. C. S. D., 1912) and *Drapeau v. United States*, 195 Fed. 130 (C. C. S. D., 1912), for their out-of-pocket expenses. And later by the Act of August 11, 1916, 39 Stat. 509, which authorized retroactive per capita payments to the Indian claimants in those cases, it was provided that the Secretary of the Interior might determine the compensation due to the attorneys for their services and make payment out of the per capita payments. By the Act of July 6, 1912, 37 Stat. 1246, the Secretary of the Interior was authorized to determine fees for the attorney for minor Cascade Indians in their allotment suit, payment to be made out of any money standing to the credit of the minors, and later Congress appropriated federal funds to pay the attorney, the Government to be reimbursed out of the first moneys from the leasing or sale of the minors' lands. Section 23, Act of June 30, 1913, 38 Stat. 77, 100. More recently, by the Act of March 9, 1940, 54 Stat. 48, Congress has appropriated

moneys to compensate attorneys who successfully prosecuted allotment claims of certain Quinaielt Indians (*Halbert v. United States*, 283 U. S. 753 (1931)), the amount paid to be reimbursed to the United States out of funds accruing from a future sale of timber or the allotments. See H. Rept. No. 1771, 75th Cong., 3d sess.; H. Rept. No. 526, 76th Cong., 1st sess.; S. Rept. 107, 76th Cong., 1st sess.

All these cited instances serve to emphasize that Congress, rather than impliedly consenting by the 1894 Act that the court impose a lien upon and sell the allotments to compensate attorneys and pay other expenses of litigation, has reserved to itself and the executive departments full control over the restricted allotments and has adopted a policy of arranging compensation for attorneys on an individual case basis after considering each case on its own merits. In consideration of such cases, Congress has never directed a forced sale of an allotment to satisfy claims of attorneys, but at most, if the Secretary of the Interior was not holding any funds of the allottee, has in effect recognized the existence of an unenforceable lien, and authorized payment to the attorneys out of income or the proceeds from the sale of the allotment in normal course. This policy of Congress, conforming as it does to its policy of preserving Indian allotments, is fair to the Indians and to attorneys for indigent Indians. It assures appellee attorneys that it is possible to obtain reasonable compensation for their services through the Secretary of the Interior or Congress, and no reason is apparent why they should not fairly be left to such procedures. In any event,

it is not for the courts "to determine questions of Indian land policy." *Arenas v. United States*, 322 U. S. 419, 432 (1944).

II

The values found by the district court for the Indian's interest in the various parcels of the allotments are excessive and not supported by competent evidence

On the prior appeal this Court directed that in fixing the dollar value of the services rendered the court below should "determine the value of the thing secured by the litigation, namely, the reasonable value of the Indian's interest in the allotted land under the trust patent, as one of the elements to be taken into consideration." *Arenas v. Preston*, 181 F. 2d 62, 67 (C. A. 9, 1950). The district court found (Finding VIII, R. 70-71) that the reasonable market value of the Indian's interest in the allotted lands was a total of \$412,000, and also found (Finding IX, R. 71) that the market value of the fee simple title of the allotted lands was the same as the reasonable value of the Indian's interest. Neither finding is supported by the evidence.

That these findings are directly contrary to the evidence is especially clear with respect to the 2-acre lots in Section 14 and the 5-acre lots in Section 26. As to these lots the findings as to value of the Indian's interest under the trust patent are in exactly the same amounts as the highest testimony as to the value of the fee simple title, namely, \$40,000 for each of the 2-acre lots and \$66,000 for each of the 5-acre lots (R. 70-71, 154-156, 401, 406-407; Petitioners' Exhibit

No. 14, p. 15). However, all the witnesses were agreed that the value of the Indian's interest under the trust patent was substantially less than the value of the fee title (R. 184-186, 194, 199, 594-595, 606). Appellees' witnesses testified that the value of the Indian's interest was 40% less than the fee value (R. 185, 194, 199), while according to appellants' witnesses the difference would be much greater (R. 594-595, 606). Hence, it is plain that the findings as to value are greatly in excess of the evidence and are therefore erroneous. Since these findings were the basis for the award of compensation for services rendered, it is likewise clear that the award of fees is erroneous and must be reversed.

It is true that witness Gallagher testified that the values of the fee title and the trust patent interest would be the same if it were assumed that the trust period would expire in May 1952 (R. 184). However, this opinion, based as it is upon an improper assumption, cannot be deemed to support the findings as to value. As appellees acknowledge (R. 234), the trust period may be further extended by the President in his discretion. 25 U. S. C. secs. 348, 391. And it has been customary that trust periods be further extended. 25 C. F. R., Appendix, pp. 367-370. From 1934 through 1951, these extensions have been accomplished through general Executive Orders issued annually, and have usually been for an additional 25-year period. 25 C. F. R., Appendix, p. 370; Executive Order No. 10027, January 6, 1949, 14 F. R. 107; Executive Order No. 10091, December 14, 1949, 14 F. R. 7513; Executive Order No. 10191, December

13, 1950, 15 F. R. 8889. Acting under a delegation of authority from the President, the Secretary of the Interior has extended for one year all trust patents due to expire in 1952. 17 F. R. 799. It is plain, therefore, that the only portion of Gallagher's testimony as to the value of the trust patent interest that has any materiality here is his opinion that, if the President had the power to extend the existing trust period for as much as ten years, the value of the trust patent would then be 40% less than the fee value (R. 184-186, 194).

Thus, it is clear that, although professing to follow this Court's direction that the amount of compensation be determined in consideration of the value of the Indian's interest under the trust patent, the district court has determined the amount of compensation due to appellee attorneys in the light of the value of the full fee title of the allotted lands. It cannot be disputed that the trust patent value is substantially less than the fee value, so that even if it be assumed that the benefit to the Indian is to be measured by the value of his trust patent interest, the award is patently excessive. But in this case the discrepancy between the fee title value and the thing recovered for the Indian in the litigation is even greater than the difference between the values of the trust patent and the fee. The actual benefit to the Indian in this case is clearly less than the value of the trust patent interest. It was never questioned that Lee Arenas was a duly enrolled and recognized member of the Palm Springs Band (Record in No. 11195, p. 45), so that there never was any question

that he would be entitled to an allotment if allotments were to be made on the reservation. The ultimate issue to be determined in the allotment proceeding was whether the United States should hold title to the lands involved in trust for the tribe or Lee Arenas. The result is that in return for an allotment in severalty, the Indian has given up his interest in common to the tribal lands allotted or to be allotted to other members of the band as a result of his successful suit under the 1894 Act. Obviously, the actual benefit to the Indian is no more than the benefit accruing to a plaintiff in an ordinary partition suit. In such cases, the benefits are held to be too slight or speculative to support any award of attorney fees measured by the value of the thing recovered. *Fletcher v. Coomes*, 285 Fed. 893, 896-897 (C. A. D. C., 1922); cf. *Thomas v. Peyser*, 118 F. 2d 369, 371 (C. A. D. C., 1941).

We have demonstrated, *supra*, pp. 31-33, that the findings of trust patent value of the 2-acre and 5-acre lots are contrary to the evidence in that the findings are in the exact amounts of the highest testimony as the value of the fee simple title, which all the witnesses agreed was substantially greater than the value of the trust patent interest. It is acknowledged that the findings of values of \$100,000 for each of the 40-acre parcels in Section 26 are supported by the testimony of appellees' witnesses Gallagher and Beckley, who estimated that the fee simple values of these two parcels were in the amount of \$455,000 and \$380,000, respectively (R. 198; Petitioners' Exhibit

No. 14, p. 15).⁷ However, it is submitted that the opinions of these witnesses were not competent evidence of value and should not have been considered by the court.

These witnesses reached their estimates of value chiefly, if not entirely, by an arithmetical process of averaging the values of lands in sections adjacent to Sections 14 and 26 (R. 116–117, 199–200, 424, 641, 649–651; Petitioners' Exhibit No. 14, pp. 19–20, 22), that is, they first determined values for all properties, chiefly small lots, in the well-developed sections adjacent to the Indian sections, added the values for properties in the sections to obtain the total value of each section, divided the sum of the section values to obtain the value of an average section, discounted such average value to obtain the value of the Indian sections, and then divided this result by 640 to get the average value per acre in the Indian sections. Such an arbitrary method of appraisal is bad enough in itself to warrant a finding that the resulting estimates were utterly incompetent. But in the instant case the use of other incompetent factors makes such a process of even less probative value. In determining the values of properties in adjoining sections, the

⁷ According to these witnesses the values of the trust patent interest would be 40% less, or approximately \$273,000 and \$228,000, respectively, a total of \$501,000 for the 80 acres (R. 184–186, 194, 199). The court found a value of \$200,000 for the 80 acres, while the highest testimony by any witness for appellants was \$140,000 as the fee value of the 80 acres (R. 576). Applying Gallagher's estimate of a 40% depreciation would establish a trust patent value of \$84,000 for the 80 acres as the highest estimate by the witnesses, excluding Gallagher and Beckley.

witnesses relied chiefly upon listings and assessed valuations. (R. 174-177, 199-200, 640-641); actual sales were of only incidental consideration (R. 416-417). They took the assessed valuations not only of land, but of improvements as well (R. 176-177, 200), and multiplied such assessed valuations by five to determine value (R. 175-176). Under this unusual method of valuation, building lots in well-developed areas would be no more valuable than raw acreage; an acre on a main highway would be no more valuable than an interior acre with poor access; and an acre improved with substantial buildings would be no more valuable than vacant land. The absurdity of such a method of valuation is readily apparent, and the opinions based upon such a method should have been stricken upon appellants' motion (R. 40-41, 63-65; see R. 66, 214). *Atlantic Coast Line R. Co. v. United States*, 132 F. 2d 959, 963 (C. A. 5, 1943); *San Diego Land & Town Co. v. Neale*, 88 Cal. 50, 62, 25 Pac. 977, 980 (1891).

Indeed, the opinions of appellees' witnesses are subject to still further attack. In estimating the value of the allotted lands here involved they assumed, not only that these lands would be freed of restrictions, but also that all of the Indian lands in the section would be similarly without restrictions against alienation and that the unsightly conditions would be cleaned up so that the entire section could be developed along the lines in the adjoining sections (R. 154-162, 167, 199, 411-412, 413-415). The extremely speculative nature of this assumption is evident from the rejection over a period of years of

various plans looking to the development of all of Section 14. See *United States v. Arenas*, 158 F. 2d 730, 741-745. They also assumed that variances in the zoning regulations would be made to permit the highest and best use of the land (R. 165-166, 201, 408, 421). Obviously, such considerations have no place in reaching an opinion as to present market value. They result in a determination of value not of the property involved, but of the property as it might be in the unascertainable future. Although it is proper to consider all possible uses of the property, such consideration must be limited to the extent that the availability and adaptability of the property for other purposes would affect present market value, and the mere potentialities may not be considered as having a present existence. *Olson v. United States*, 292 U. S. 246, 255 (1934); *Long Beach City High School Dist. v. Stewart*, 30 Cal. 2d 763, 766-768, 185 P. 2d 585, 586-589 (1947); *Los Angeles v. Geiger*, 94 Cal. App. 2d 180, 190-191, 210 P. 2d 717, 724 (1949).

Thus, it is plain that the opinions of Gallagher and Beckley, based as they were upon improper considerations, were of no probative value, as is further evidenced by the fact that neither witness could cite a single instance of a sale of acreage in the Palm Springs area that would support their fantastic estimates of value (R. 177-181, 202-204, 426-428). Clearly, their opinions should have been stricken. And without such opinions there is no evidence to support the court's findings of value.

III

The district court erred in denying appellants' motion to amend findings of fact, conclusions of law and judgment to provide for attorney fees measured by a percentage of the value of the allotments up to, but not exceeding the amount awarded

In this case the expert testimony as to the value of the allotted lands ranged from \$50,000 to \$1,047,000 (R. 595; Petitioners' Exhibit No. 14), and even the court's finding of a value of \$412,000 (R. 71) is greatly in excess of appellants' highest testimony of \$245,000 as the fee value (R. 575) and \$87,800 as the trust patent value (R. 433).⁸ Indeed, the \$90,000 award of attorney fees exceeds the highest estimate by appellants' witnesses as to trust patent value. Thus, if it develops that the valuations of the trust patent interest by appellants' witnesses are correct, the result would be that the attorneys would receive more in fees than the value of the thing recovered, i. e., the Indian's interest in the lands under the trust patent. Obviously, such a result is not in accord with an equitable determination of attorney fees on a *quantum meruit* basis. And even if the value of the unrestricted fee is deemed the material factor, on the assumption that appellants' testimony as to value is more nearly correct, similar inequities would be apparent. According to the testimony of appellants' most liberal witness, the present fair market value

⁸ The court below ruled that the allotted lands should be valued as of the time of trial in 1951 (R. 435). Inasmuch as the 1951 valuations of appellants' witness would be 10% less than the above testimony (R. 436-437), the discrepancy would be even greater than indicated.

of the fee title would be approximately \$220,500 (R. 436-437, 575). It could reasonably be expected that the proceeds of any sale would be considerably less than this figure because of the forced nature of the sale. The net proceeds would be further reduced by the expenses of sale, so that, after payment of the \$90,000 fees, it is possible that the allottee would realize little or nothing and could even end up without any of his allotment and still be in debt to appellee attorneys.

In view of these possibilities, appellants, as an alternative to a motion for new trial, filed a motion to amend the findings of fact, conclusions of law and judgment to provide for compensation in the amount of 22½% of the value of the allotted lands up to but not exceeding \$90,000, in lieu of a flat fee of \$90,000 (R. 80-83, 449-450). In other words, the recovery would be \$90,000 or 22½% of the value of the allotted lands, whichever was the lesser. The court below was impressed with the apparent equity of the proposed amendment and apparently would have granted the motion if it had not been for the thought that such amendment was foreclosed by this Court's mandate (R. 85-86, 454-455, 457-462). It is clear that in so thinking the court below misconstrued the mandate.

The proposed amendment is in no way inconsistent with the mandate and in fact conforms to this Court's direction (181 F. 2d at p. 67): "The chancellor will of course, see to it that no unconscionable fee or extravagant expenditure will be allowed and will protect the allotment from being affected in the slightest unnecessary manner or degree." On the prior appeal

this Court disapproved the percentage award because it was apparently based upon a contract which could not be of any effect in view of the governmental interest, and because it was impossible to determine the fairness of the award without any finding as to the value of the allotment (181 F. 2d at p. 67). The percentage award was also vitiated by the fact that the judgment could not be satisfied and the lien discharged without first selling the property. Judgment in the alternative, a percentage of value or a flat sum, whichever is the lesser, would meet all of these objections and would at the same time obviate the possibility of an unconscionable result. Clearly, the granting of the requested amendment was within the power of the district court, or at least is within the power of this Court. And there can be no question as to the equity of the amendment.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court should be reversed.

Respectfully,

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FEBRUARY 1952.

No. 13103.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA and LEE ARENAS,

Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK, and DAVID D.
SALLEE,

Appellees.

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Opinion Below.

The district court did not write an opinion. Its findings and conclusions appear at pages 67-74 of the record. The opinion in this case on the former appeal is reported at 181 F. 2d 62.

Jurisdiction.

The district court had jurisdiction of the action under which this fee proceeding arose under the Act of August 15, 1894, 28 Stat. 286-305, as amended, 25 U. S. C. A., Section 345.

This Court has jurisdiction on appeal under 28 U. S. C. A., Section 1291.

Questions Presented.

The questions presented on this appeal are:

1. Whether this Court should disregard the law of the case as decided in *United States and Lee Arenas v. John W. Preston, et al.*, 181 F. 2d 62.

2. Whether the district court complied with the mandate of this Court in fixing the value of the allotted lands at \$412,000 and attorneys' fees in the amount of \$90,000.

3. Whether the district court erred in denying appellants' motion to amend the findings, conclusions and judgment to provide that appellees' fees be fixed by a percentage of the value of the allotted lands.

Statute Involved.

The statute involved is the Act of August 15, 1894, 28 Stat. 286-305, as amended, 25 U. S. C. A., Section 345, a copy of which appears at pages 3-4 of appellants' opening brief.

Statement.

This appeal is from a judgment of the district court awarding attorneys' fees to appellees in the amount of \$90,000 for services rendered to Lee Arenas in an action to determine his right to an allotment of lands in severalty and a trust patent thereto. A former judgment for such fees was reversed by this Court, 181 F. 2d 62, on the grounds: (1) That the trial court should have fixed

the dollar value of the services rendered by appellees, and (2) that in fixing the dollar value of appellees' services the trial court should have considered and determined the value of the Indian's interest in the allotted lands "as one of the elements to be taken into consideration."

At the retrial of the fee proceeding the trial court fixed the value of the Indian's interest in the allotted lands at \$412,000, and the dollar value of appellees' services at \$90,000. The judgment impressed a lien upon the allotted lands to secure payment of the amount awarded, and allowed Lee Arenas six months after the date of entry thereof within which to pay the judgment. [R. pp. 75, 76.]

Summary of Argument.

1. Appellants are not entitled to a review of the law of the case as announced by this Court in *Arenas v. Preston*, 181 F. 2d 62.

2. The district court complied fully with the mandate of this Court at the second trial of this cause.

3. The district court did not err in denying appellants' motion to amend the findings and judgment to provide that appellants' fees be fixed on a percentage of the value of the allotted lands.

ARGUMENT.

I.

**Appellants Are Not Entitled to a Review of the Law
of the Case as Announced by This Court in *Arenas
v. Preston*, 181 F. 2d 62.**

The foregoing proposition of law is discussed fully in our brief in the companion case of *United States and Eleuteria Brown Arenas v. Preston, et al.*, No. 12962 in this Court, at pages 9-11 thereof, to which the Court is respectfully referred.

It is settled law that "when an issue is once litigated and decided, that should end the matter." (*United States v. U. S. Smelting etc. Co.*, 339 U. S. 186, 198.)

See also, to same effect:

Insurance Group Com. v. Denver & R. G. W. R. Co., 329 U. S. 607;

Messinger v. Anderson, 225 U. S. 436, 444;

Penzinger v. West Am. Fin. Co., 10 Cal. 2d 160, 169, and cases cited.

The question whether the district court has jurisdiction to impress a lien upon an Indian's restricted lands was squarely presented on the former trial and appeal. Both the trial court and this Court held that such jurisdiction existed. The Supreme Court denied certiorari. (*United States v. Preston*, 340 U. S. 819.)

Appellants' insistence that this Court review the law of this case is without merit, is contrary to the decisions of this Court and the Supreme Court, and is likewise contrary to established rules of law. Not one valid reason has been adduced for such a review. This case has run its course, and an end of it should be judicially declared.

II.

The District Court Complied Fully With the Mandate of This Court at the Second Trial of This Cause.

The evidence at the former trial (February 11, 1948, and subsequent dates) was before the Court at the second trial. [R. Vol. 1, p. 99 *et seq.*] Other evidence was also introduced and received at the second trial.

A. Evidence Concerning Value of Allotted Lands.

Joseph A. Gallagher and Benton Beckley testified, as to the value of the lands allotted to Lee Arenas, on behalf of appellees. Mr. Gallagher is a qualified expert on land values, being President of American Right of Way and Appraisal Contractors, and having had many years of experience in appraisal work. He was district land agent for the Los Angeles Department of Water and Power, project manager for the U. S. Engineers during World War II, and has held many other positions involving land appraisals. [R. pp. 104-110, *et seq.*] He appraised the Lee Arenas lands (94 acres) at the total sum of \$1,047,000. [R. p. 183.] The evidence of this witness covers many pages of the record. It is sufficient to say that he gave good reasons, in detail, for the valuation placed on the Lee Arenas lands.

Benton Beckley has resided in Palm Springs for 11 years, and was a licensed real estate broker there during that period. He agreed with the valuations placed by Mr. Gallagher on the Lee Arenas land. [R. p. 198, *et seq.*]

Both of these witnesses testified that their valuations were on a fee simple basis. We shall discuss this later herein.

Donald C. Jones testified on behalf of appellants. He valued the Lee Arenas lands at a total of \$87,800, in answer to a hypothetical question full of qualifications and limitations. [See question, R. pp. 431-433.] A mere reading of the question reveals that Mr. Jones believed the qualifications and limitations of and upon Arenas' title reduced the value of the lands to a figure so low as to be absurd.

At the first trial of this fee proceeding the Government's appraisers, Donald C. Jones and Bernard G. Evans, appraised the fee value of the Lee Arenas lands as follows:

Donald C. Jones, fee value	\$245,000.00
[R. pp. 575-576.]	
Bernard G. Evans, fee value	\$211,500.00
[R. pp. 604-605.]	

It is interesting to note that in a subsequent colloquy between the Court and Mr. Brett, government counsel, the latter stated that the land was worth from \$186,000 to \$190,000. [Supp. typed transcript, p. 29.] Mr. Ennis, personal attorney for Lee Arenas, valued the land at \$400,000 to \$450,000. [Supp. Tr. p. 47.]

Obviously, the evidence on value was conflicting. The trial court did not err in finding the value to be \$412,000. Moreover, the trial Judge stated that he had often been in Palm Springs, some times as long as 30 days, and that he had personal knowledge as to the Lee Arenas lands. He certainly was conservative in the valuation placed on the lands. [Supp. Tr. p. 19.]

**B. The Trial Court Properly Admitted Evidence of Value
Based Upon Title in Fee Simple.**

Appellants complain here, as in the *Eleuteria Brown Arenas* case, that the trial court erred in admitting evidence of value based upon fee simple title. This question is fully discussed in appellees' opening brief in appeal No. 12962, at pages 11-15, to which the Court is respectfully referred.

"The restraint on alienation must not be exaggerated. It does not of itself debase the right below a fee simple." (*United States v. Paine Lumber Co.*, 206 U. S. 467, 473.)

"The virtual fee is in the allottee, with certain restrictions on the right of alienation." (*United States v. Minnesota*, 113 F. 2d 770, 773; *United States v. Oklahoma G. & E. Co.*, 127 F. 2d 349.)

"While the Government retains the legal title in trust for the Indian, the title of the Indian, except for the limitation against alienation, is, in reality, a title in fee simple." (*Eastman v. United States*, 28 Fed. Supp. 807, 808.)

"The right of perpetual and exclusive occupancy of the (restricted) land, is not less valuable than the full title in fee." (*United States v. Shoshone Tribe of Indians*, 304 U. S. 111, 116, and cases cited.)

"If 'Indian title' is something less than a fee simple, then in cases of involuntary alienation damages should be based upon something less than the value of the land itself. Yet the courts hold that in such cases the value of the land is the measure of damages." (Cohen's Handbook of Federal Indian Law 321.)

To the same effect:

Choate v. Trapp, 224 U. S. 665;

Leavenworth etc. Co. v. United States, 92 U. S. 733, 742;

Beecher v. Weatherby, 95 U. S. 517, 525.

The trial court did not err in receiving evidence of the fee simple value of the lands. Moreover, it is to be noted that the finding of value is little more than one-third of the valuation placed thereon by Gallagher and Beckley, and about the same as the value placed on the lands by Mr. Ennis, personal counsel of Lee Arenas.

Since value of the lands was only one of the elements to be considered in valuing appellees' services, it is difficult indeed, to understand the great emphasis placed thereon by appellants.

C. The Fee Allowed Is Reasonable.

At the former trial of this proceeding Messrs. T. B. Cosgrove and L. R. Martineau, Jr., testified as to the value of appellees' services in this case. They placed their valuations of such services at 27½% of the value of the property. The Court found the value of the property to be \$412,000, and 27½% of that amount is \$113,300. The amount awarded as fees is \$90,000.

The amount thus awarded is in line with the value placed on appellees' services by Mr. Ennis, the personal attorney of Lee Arenas, who stated to the trial court that such "services are worth somewhere around \$100,000." [Supp. Tr. p. 49.]

Mr. Brett, Government counsel, stated to the Court, in respect to the fee, "that a leeway of from \$35,000 to

\$50,000" was reasonable. [Supp. Tr. pp. 31-32.] In this connection he stated that appellees had "practically performed a miracle when he got the Supreme Court of the United States to consider the 1907 (1917) Act as a mandatory act," and "more of a miracle when he got your Honor to agree with him and, in fact, he got two judges to agree with him and the Court of Appeals." [Supp. Tr. p. 33.] Mr. Brett stated further that he did not think the last mentioned services were compensable, but "If I am wrong in that, I would raise my estimate" as to size of fee. [Supp. Tr. p. 33.]

Appellee Oliver O. Clark stated to the Court that in his opinion the Lee Arenas lands could be fairly valued at \$500,000. [Supp. Tr. p. 51.] After referring to the numerous trips that he and appellee John W. Preston had made to Washington in connection with the Arenas litigation, the period of about 11 years spent in the litigation, and other expenses, Mr. Clark said,

"* * * if we should be paid only by Lee Arenas from his property the fee suggested by Mr. Brett, we would not recover the money we have actually paid out." [Supp. Tr. p. 54.]

The facts disclosed by the record show that the trial court obeyed the instructions of this Court on remand, and that the judgment for \$90,000 is just and reasonable, considering the value of the Indian's property and the various elements entering into the placing of a reasonable value upon appellees' legal services rendered on behalf of Lee Arenas.

III.

The Trial Court Did Not Err in Denying Appellants' Motion to Amend Findings and Judgment to Provide for Fixing Appellees' Fees on a Percentage of the Value of the Allotted Lands.

It is clear that if the trial court had granted appellants' motion to amend the findings and judgment so as to provide fixing attorneys' fees on a percentage basis, the same error would have been committed that caused this Court to reverse the former judgment. The trial court very properly denied the motion.

Nor would the error have been cured by limiting the total recovery to \$90,000. The vice of a fee fixed on a percentage of the value of the lands was pointed out in this Court's opinion in *Arenas v. Preston*, 181 F. 2d 62, at page 67: "It may be that the value of the percentage allowed for attorney's fees upon a finding of the property value, would prove either inadequate or grossly excessive." (*Id.*) The trial court closely followed this Court's instructions (1) by fixing "the dollar value of the services performed," and (2) "in so doing (by determining) * * * the value of * * * the allotted land under the trust patent, as one of the elements to be taken into consideration."

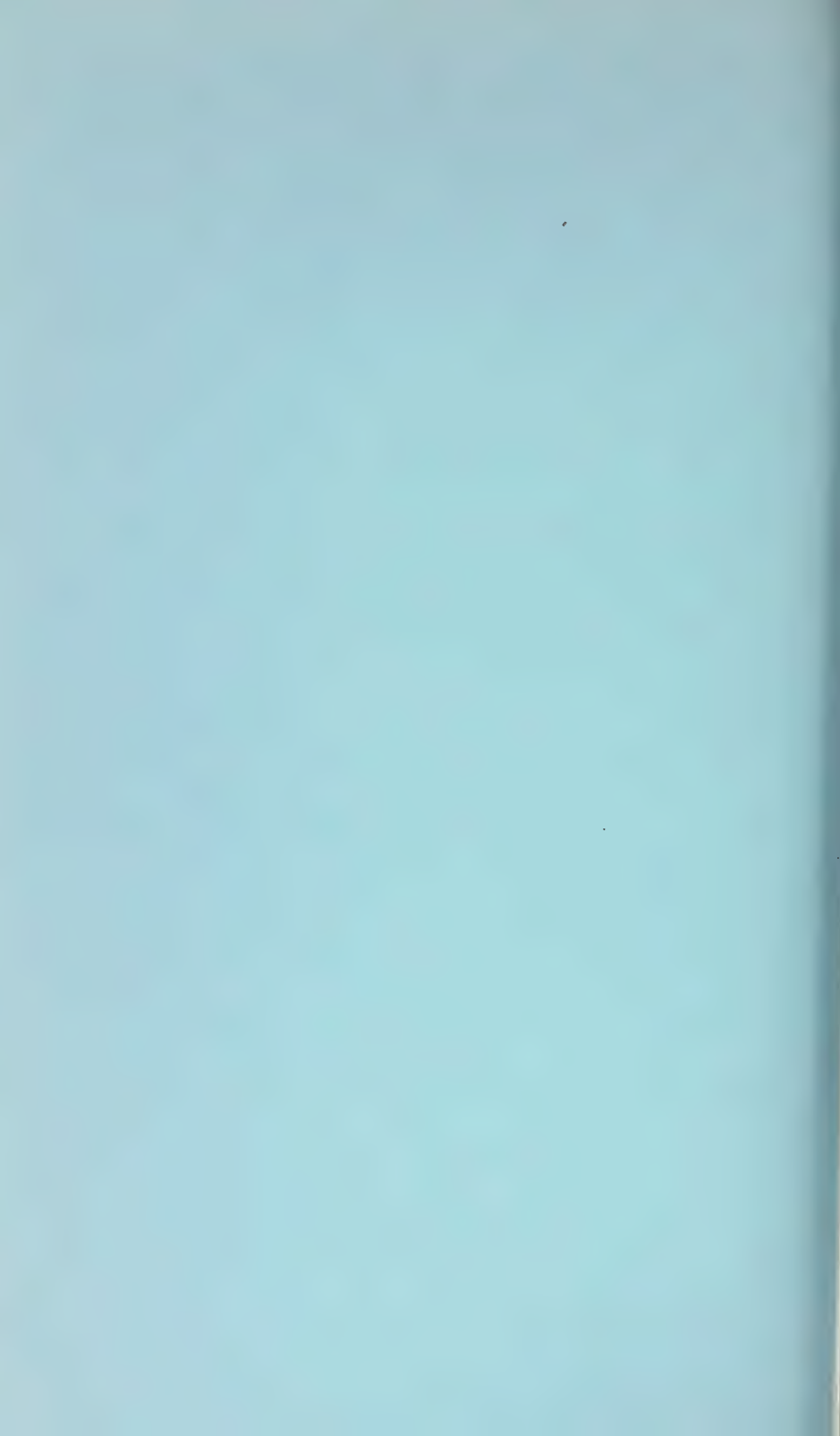
Conclusion.

The judgment is free from error and should be affirmed.

Respectfully submitted,

JOHN W. PRESTON,
OLIVER O. CLARK,
DAVID D. SALLEE,

Attorneys for Appellees.



APPENDIX.

In this appendix appellees present excerpts from the reporter's supplemental transcript which are pertinent to the citations thereto made under Point II of the Reply Brief. These excerpts are from statements made in open court on February 16, 1951, by Irl D. Brett, Special Assistant to the Attorney General; John M. Ennis, Esq., personal attorney for Lee Arenas; and Oliver O. Clark, one of the appellees herein.

STATEMENTS OF IRL D. BRETT.

"Well, your Honor, I have indicated that I believe the figure between \$186,000 and \$190,000, roughly, would be about the fee value (of the Arenas property)."

"I would say that, in my opinion, on that basis an attorney fee of \$25,000 and \$35,000, in my view, would be a fair fee for the services rendered in this case." [Supp. Tr. p. 29, lines 24-25; p. 30, lines 1-4.]

"Under those circumstances, I feel—I will put it this way: I would say, your Honor, that a leeway of from \$35,000 to \$50,000. I will go that far." [Supp. Tr. p. 31, lines 24-25; p. 32, line 1.]

"I do not want to lose track of this fact: Judge Preston, as I have told him personally and I told this court, I think, practically performed a miracle when he got the Supreme Court of the United States to consider the 1907 [*sic*] Act as a mandatory act. And I think he has performed more of a miracle when he got your Honor to agree with him and, in fact, he got two judges to agree with him and the Court of Appeals. But I do not agree that this last service is something that you can award him for here. If I am wrong in that, I would raise my estimate." [Supp. Tr. p. 33, lines 1-10.]

“Now, I have in mind, however, in my suggestion as to the fee—and I am rather in a difficult spot because I would say that it will be approved, whatever your Honor will do, so I am merely giving you my view as a lawyer—I have in mind two other things to consider. One is these two gentlemen who testified in behalf of the petitioners. And while I do not know Mr. Martineau too well, I know that he is a man of ability. I do know Mr. Cosgrove and have known him for years, and I esteem him very highly.

“Mr. Cosgrove figured the top, irrespective of what it might be, of $27\frac{1}{2}$ per cent; and I think his testimony indicates that he considered the very factors your Honor had in mind, the uncertainty.

“Mr. Martineau stated expressly that he was considering it on a million dollar basis. He did not fix it in money. It was around \$275,000, and his mathematics are around the same thing.

“Then I have in mind, too, this Equitable Trust case which counsel used as one of their principal authorities, in which they had certain difference, it is true, but they had certain respects similar to this matter. I believe the recovery there was around a million dollars, close to that. It was a liquid recovery as distinguished from this. Your Honor will recall that the Court of Appeals fixed a fee of \$100,000 and the Supreme Court reduced it to \$50,000.

“I realize money is different, but nevertheless, applying somewhat along those same percentages, I believe that, assuming that your Honor fixes a value of not in excess of \$200,000, a fee of around \$50,000 or maybe up to

27½ per cent would seem to apply those rules that those people have indicated to you.” [Supp. Tr. p. 35, lines 9-25; p. 36, lines 1-14.]

“I do not want to depreciate the value of these men’s services. As I say, I go very strong, I think, when I say I think they performed two miracles. I did not believe they would ever be able to get a lien against these Indian lands, but they did and I have to accept it.” [Supp. Tr. p. 42, lines 9-13.]

STATEMENTS OF JOHN M. ENNIS.

“I wanted to be practical. I think my duty to my client is to see that he is charged, as nearly as I can see to that—he is charged an equitable fee. But I think also my duty is to see that the value of his land is not debased by some decision of this court because I did not say my say.” [Supp. Tr. p. 46, lines 14-18.]

* * * * *

“I frankly believe the land is worth somewhere around \$400,000 or \$450,000. That is what I believe, but that is the opinion of an attorney who has gone to Palm Springs a few times, who has been in the nice parts of Palm Springs and the poor parts, and based upon a chronic pessimism here.” [Supp. Tr. p. 47, lines 8-12.]

* * * * *

“On the other hand, it is not worth to me a million and a half dollars. I think it is worth \$400,000 or \$450,000. What should the fee be? I do not think I want to make a statement in dollars as to that. I have re-

ferred the court to this matter of Mr. Taheny's fee of \$4,550, and the Court of Appeals believed that his affidavit was true and the statements of his services were true and they approved that application." [Supp. Tr. p. 47, lines 21-25; p. 48, lines 1-3.]

* * * * *

"However, we are bound by those other decisions. If Mr. Taheny's services were worth \$4,500, of course, the petitioners here performed services worth somewhere around \$100,000, if that value, based upon his rather elaborate affidavit, which, unfortunately I do not have a copy of here today; it is in the Court of Appeals' file and I had a copy of it, but whether these records contain a copy of it or not I do not know—but if that value is a close value, why, I believe the petitioners would probably be entitled to \$100,000, assuming that is correct, your Honor." [Supp. Tr. p. 49, lines 21-25; p. 50, lines 1-5.]

STATEMENTS OF OLIVER O. CLARK.

"Our quarrel is with the Government of the United States. I know very well that if the client could speak, as Mr. Ennis has spoken, and the matter could be settled without the interference of the Government, there would not be any difficulty in their meeting together at all. And therefore I say to your Honor that my own personal judgment is that a fair value of this court, based upon all the evidence before the court, would be about \$500,000." [Supp. Tr. p. 50, lines 19-25; p. 51, line 1.]

“* * * I feel that these things have been properly evaluated in the opinions that have been expressed here by Mr. Gallagher and by Mr. Beckley, and that their arguments on value are reasonable from the standpoint of an opinion, and I personally would depreciate it about \$500,000 as a finding by a court resting upon a good sound basis.

“I think this, your Honor: That if we should be paid only by Lee Arenas from his property the fee suggested by Mr. Brett, we would not recover the money that we have actually put out. I personally have been in Washington, D. C., four times on this matter. Judge Preston has been there, I think, at least three times, and we have been engaged in the matter for 11 years come this next July.

“And I say that during that time the money that I have personally actually expended in traveling expenses and the maintenance of my office and otherwise would not be reimbursed to me by any such fee as Mr. Brett has fixed.” [Supp. Tr. p. 54, lines 12-25; p. 55, lines 1-3.]



No. 13105.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RAYMOND W. CLAWSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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JAN 31 1952

PAUL P. O'BRIEN
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No. 13105

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RAYMOND W. CLAWSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

I.

Jurisdiction.

Appellant was charged in an Information and convicted under the Internal Revenue Act, 26 U. S. C. A. 145(a) [C. R. 1].¹ The District Court had jurisdiction under Section 24 of the Judicial Code (28 U. S. C. 41 (a)). Judgment was entered and Notice of Appeal was filed on May 21, 1951 [C. R. 37-39]. This Court has jurisdiction under Section 128 of the Judicial Code (28 U. S. C. A. 225).

¹The references "C. R." are to the Clerk's Transcript on appeal; the references "T. R." are to the typewritten transcript of testimony on appeal; the references "Govt. Ex." and "Deft. Ex." are to the Government's exhibits and the appellant's exhibits, respectively.

Statute Involved.

Section 145(a) of the Internal Revenue Code insofar as applicable here provides:

"Failure to file returns. * * * Any person required under this chapter * * *, or required by law or regulations made under authority thereof to make a return * * * who wilfully fails to * * * make such return * * * at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than one year, or both, * * *."

Statement of the Case.

Appellant was arraigned before the United States District Court for the Southern District of California, Central Division, upon a one count Information filed in the name of the United States Attorney [C. R. 1], charging that appellant had violated the Internal Revenue Code by failing to file an individual income tax return for the year 1946 [*Id.*]. Appellant was tried, after his plea of not guilty [C. R. 8], before the District Court and a jury, and was found guilty as charged [C. R. 31; T. R. 828]. After appellant's various motions [C. R. 32-35; T. R. 431-435, 786]² had been denied [C. R. 36, 431-435, 787], the District Court sentenced appellant to imprisonment for a term of one (1) year [C. R. 36].

²Discussed more fully below.

Specification of Errors and Points of Law.

I.

The record does not contain that minimum quantum of evidence which the law requires to sustain a verdict of guilty upon the offense charged in this case.

II.

The District Court erred in denying appellant's motion for a Bill of Particulars.

III.

The District Court erred in refusing to entertain appellant's motion for return of illegally seized property and for the suppression of evidence.

IV.

The District Court erred in admitting certain evidence offered by the Government.

V.

The District Court erred in refusing to accord to appellant the opportunity of obtaining evidence to refute matters as to which appellant was caught by surprise.

VI.

Appellant was denied due process by virtue of the action of the prosecutor in shifting his theory of the case after all of the evidence was in the record.

VII.

The Court erred in giving to the jury certain instructions offered by the prosecution.

VIII.

The Court erred in refusing to give to the jury certain instruction requested by appellant.

IX.

The Court erred in refusing to grant the motion for a new trial.

X.

The District Court erred in admitting into evidence the second-degree hearsay testimony and the hearsay medical records. The documents were privileged and the prosecution therefore illegally obtained and utilized them.

XI.

The prosecutor deprived appellant of a fair trial by improperly cross-examining appellant, by misstating the law and the evidence in the case and by improperly exhorting the jury to return a verdict of guilty.

Summary of Argument.

The conviction of appellant constitutes a gross miscarriage of justice. His conviction is not supported by substantial evidence, is based on improper arguments and theories of the prosecution, and on errors in law, and is encumbered by denials of due process. These are all discussed fully below.

Statement of Facts.

The facts, in brief, are as follows:

Appellant was born in 1906 in San Jose, California, the grandson of Sarah Names of Oakland, California [T. R. 525].

His grandmother, a wealthy woman, gave to him directly and indirectly and sent to him through the Postal-Telegraph Co., and Western Union Telegraph Co., be-

tween \$10,000 and \$15,000 a year during most of his adult life, until shortly prior to her death in 1945 [T. R. 245, 253-254, 329-330, 337-338, 435-449, 473-479, 528-531, 736-742].

Prior to 1944, appellant did not engage in any gainful employment for more than a very brief period [T. R. 245, 329, 472-475, 528, 736-737, 742]. As one of the concomitants of having a rich and generous grandmother, and also a wealthy wife, appellant produced no "income" as that term is defined for income tax purposes [T. R. 329, 339, 530-531, 619-620, 737-742].

(It may be stated parenthetically here that it is appellant's contention that in 1946, the year involved in this case, he still did not receive the minimum gross or net income of \$500,—which would have necessitated his filing an individual income tax return for that year.)

During the year 1946 appellant did not file an individual income tax return.

For several years prior to 1946 appellant was the principal spirit behind Clawson Enterprises, Inc., a California corporation, a holding company, incorporated in February, 1944 [T. R. 18; Govt. Ex. 1]. In 1944, 1945 and 1946 this Corporation operated a cafe and bar called "Clawson's Restaurant," and, in 1946, a newspaper, the "Crenshaw-Mirror," and two boats, the "Artemis" and the "Conqueror" [T. R. 597-600, 743-744].³

³It should be noted at this point that due to the Government's shifting in this case between the "*alter ego*" theory and the "constructive dividend" theory, as discussed more fully below, it is impossible to determine whether the Government agrees with or disputes these facts. Indeed, a definite decision will have to be made by the Government as to which facts it intends to accept as the evidence most favorable to it under whatever theory it adopts.

Appellant had incorporated Clawson Enterprises, Inc., hereinafter called the Corporation, after full advice by an attorney, Frederick H. Clapp, of Los Angeles [T. R. 743-744].

Out of a total of 120 shares, appellant held one share of the stock in the Corporation, his stepfather owned one share, Kathleen A. Clawson, his wife, one share, and his boyhood school-headmaster, Charles Hicks, treasurer and secretary of the Corporation, held 197 shares [T. R. 198, 215, 218-220, 222, 225, 244, 526, 544, *ff.*; Gov. Exs. 17, 18].

The money to purchase and operate the restaurant and bar, totalling between \$45,000 and \$50,000, was borrowed by appellant from his mother, from his prior wife, from his then-current wife, from Hicks, and from various other persons, as well as lending companies which held appellant's wife's personal belongings as security for such loans [T. R. 251-255, 263-264, 273-274, 279-285, 309, 479-482, 496-524, 533-534, 542-543, 561-564, 566-567, 571-572, 581-587, 594-601, 606-610, 638, 672-685, 700-701, 707-709, 717-726, 742-750, 759-760; Govt. Exs. 4-B-1, 7, 29-A to 29-H, 30, 50, 50-B, 50-C; Deft. Ex. F]. These funds were, for the most part, deposited into the Corporation's bank account.

Because appellant had certain personal outstanding debts, he did not wish to jeopardize the interest of the new lenders by placing their money into a corporation owned primarily by himself; therefore appellant, although he was the prime mover behind Clawson Enterprises, Inc., placed the bulk of the stock in the hands and name of Charles Hicks, who was one of his creditors [T. R. 221, 229-230, 534-535, 641; Govt. Exs. 1-A, 1-B, 17].

Appellant's stepfather, who supplied his and Clawson's mother's money for the liquor license, and also supplied further funds for operating expenses later, took the liquor license in his (stepfather's) own name, for similar, as well as other reasons [T. R. 509-524, 533-534, 543, 638; Govt. Exs. 40, 49-A, 49-B].

Clawson's Enterprises, Inc., operated "Clawson's Restaurant" as a losing proposition. Instead of returning any profit, it required constantly new operating capital (see references above). It never declared or paid out any dividends; appellant did not receive any salary and he did not have any drawing account [T. R. 221, 287, 562-565, 609-610]. Although appellant did use some of the money brought into the Corporation, it was taken in repayment of loans he had previously made to it; moreover, the total never reached the sums he had invested of his own or other's money which he had borrowed and then used to pay the Corporation expenses.

To continue the restaurant and bar in existence, in the hope of ultimately salvaging the borrowed money invested in it, appellant and the other officials of the Corporation, continually borrowed more and more money, and put it into the Corporation's account and paid its bills [T. R. 251-262, 547-557, 640; see also references above].

The secretary-treasurer, although he was well aware of the nature of these funds, however failed to enter them all on the Corporation's records [T. R. 252-253].

The Corporation was duly organized and existed under the laws of the State of California, with by-laws, stock, etc. [T. R. 217, 545-547; Govt. Exs. 1, 1-B, 17, 18].

It had two active bank checking accounts which at times required two signature for the withdrawal of funds

[T. R. 546; Govt. Ex. 5; Deft. Exs. F, G, M, J, K]. It made hundreds of deposits and withdrawals totalling many thousands of dollars [T. R. 306-312; Govt. Exs. 20-22, 42-48; Deft. Exs. A-G, J, K, M]. It had books and records [Govt. Exs. 10, 11; T. R. 128-132, 199-210, 216, 297, 319-321, 542]. It had officers [T. R. 217, 244, 545-546] and numerous employees [T. R. 227, 244, 247; Deft. Exs. E-1 to E-5, H, I, L]. It engaged in various financial and commercial transactions, and paid numerous taxes [*E.g.*, Govt. Exs. 5, 6, 7, 10, 11, 20, 21, 22, 23, 24, 25, 26, 27, 41-A, 41-B, 42-48; Deft. Exs. B, C, D, E-1 to E-5, F, G, H, J, J-1, K, M, N, O].

In order to make certain that the books and records were kept in proper order, that function was delegated to secretary-treasurer Hicks, who had taught mathematics for many years and knew bookkeeping [T. R. 198-199, 243-246, 286, 552-555; Govt. Exs. 10, 11]. All entries in them for 1946 were made by Hicks, secretary-treasurer of the Corporation, by his friend Dittmars, and by an accountant, W. Leo, hired by Hicks [T. R. 198-213, 243, 246-248, 286, 303, 332, 552-555, 618-619].⁴ Appellant did not handle any of the Corporation's books or records [T. R. 198, 199, 609].

The capital and operating expenses of between \$45,000 to \$50,000 of Clawson Enterprises, Inc., for the most part *borrowed money*, had to be repaid at some date subsequent to its initial borrowing [T. R. 554-555, 610, 695].

There is no evidence in the record to indicate that any of the lenders ever relinquished or forgave their loans to appellant personally or the Corporation; in fact, the

⁴The accountant died in 1947 [T. R. 199-200, 213]. A Mrs. Gunn, accountant, hired later, failed to complete the job [T. R. 214].

record abounds with evidence to the contrary [T. R., *passim*].

The Crenshaw business district, in which the restaurant was located, showed signs of growth and business activity in 1946 [T. R. 551]. Mrs. Phyllis Clawson, who was then separated from appellant, was about to be evicted from her rented home, and had to purchase and furnish a home for herself and daughter [T. R. 381, 555-556]. She asked appellant to repay to her the loans she had made to him for the Corporation [T. R. 481, 555-556].

As a result of these factors, and because there were constant O.P.A. price problems, as well as other problems relating to supplies [T. R. 551-552], it was deemed advisable to sell the restaurant, and it was sold in the spring of 1946, for \$40,000 [T. R. 10-20, 52, 134-135, 216, 228-233, 555; Govt. Exs. 23, 24, 27, 41-A, 41-B].

At first the ultimate purchasers wanted to buy all the *stock* of the Corporation; however, due to its bad financial position, its extensive obligations and outstanding loan indebtedness, the purchasers decided, in consultation with counsel, to buy only the restaurant and its fixtures, etc., and the liquor license [T. R. 8, 13-15, 556-558; Govt. Exs. 49-D, 49-E].

The sale of these assets was duly recorded on the Corporation's books [T. R. 133-135; Govt. Exs. 10, 11].

Out of this money, appellant repaid debts, incurred on behalf of the Corporation, in part as follows: \$15,000 to Mrs. Phyllis Clawson [T. R. 481, 482]; \$9,000 to his mother and stepfather [T. R.]; \$9,500 to creditors of Kathleen Clawson, to repay the money loaned to her which she in turn had loaned to appellant and he had loaned to the Corporation [T. R. 570-573]; \$2,500 to

Nick Kalas; about \$6,000 to appellant, in repayment of moneys he had invested in the Corporation prior to 1946 or had borrowed from others personally and then had loaned to the Corporation at various times; and to others.

The balance of the funds were invested and reinvested in other business enterprises, including the "Crenshaw Mirror," the boat "Artemis" and the boat "Conqueror," to be owned and operated as a part of Clawson Enterprises, Inc. [T. R. 62, 64, 74, 248-250, 558, 568-570; Govt. Ex. 8-B; Deft. Exs. B, Q, R]. Appellant's then-wife, to whom much money was still owed on loans by her to finance the Corporation's business activities in 1946, desired security on her original loan in this connection. To protect her, the boat "Artemis," for which the down payment was made out of the moneys received from the sale of the restaurant [T. R. 558], was registered in her name. This was done for that reason and also because the seller refused to accept the note of a corporation for the balance of the purchase price [T. R. 104-105, 558-560].

To sustain the Information filed against appellant, the Government here asserted throughout the trial that the Corporation Clawson Enterprises, Inc., was the *alter ego* of appellant, and that the corporate entity had to be disregarded and all its transactions treated as though they were the personal and individual transactions of appellant. It was on this theory alone that much of the prosecution's evidence, otherwise inadmissible, was admitted. When all the evidence was in, the Government changed its theory [T. R. 807, 794-795]. After the trial the theory espoused exclusively by the prosecution was that the Corporation's money handled by appellant after the sale of the restaurant and the boat "Artemis" constituted *dividends* of the Corporation to appellant.

ARGUMENT.

A.

The record does not contain that minimum quantum of evidence which the law requires to sustain a verdict of guilty upon the offense charged in this case.

(a)

In a criminal case as distinguished from a civil tax case, it is clearly not enough for the prosecution to show that money came into the hands of the taxpayer-defendant.

The prosecution was required to demonstrate further, beyond a reasonable doubt, that the money received by the appellant was, in fact, his personal and individual income, and not the income of the corporation. This the prosecution has failed to do in the instant case.

It is appellant's position that any income received by a corporation in which appellant had an interest or which he controlled, did not constitute income to appellant personally so as to make it obligatory upon appellant to file an *individual income tax return*. (*Comm'r Int. Rev. v. Moline Properties*, 131 F. 2d 388, 389, 63 S. Ct. 1132; *Eisnar v. Macomber*, 40 S. Ct. 189; *Interstate Transit Lines v. Comm'r*, 63 S. Ct. 1279; *Harwood v. Eaton*, 68 F. 2d 12, cert. den. 54 S. Ct. 715; *Comm'r Int. Rev. v. Montgomery*, 144 F. 2d 313, 315. And see also cases cited below.

It is further appellant's contention that no funds can constitute income if the funds he received from or through the corporation constituted:

(a) repayment of loans made by appellant out of his own funds;

(b) repayment of loans made to the corporation directly or through appellant by other persons;

(c) funds to be used by appellant on behalf of the corporation;

(d) or even funds received by appellant improperly, which funds are in fact the property of the corporation;

(e) loans to appellant by the corporation or by other persons. (*Weaver v. Comm'r Int. Rev.*, 58 F. 2d 755; *Trippett v. Comm'r Int. Rev.*, 118 F. 2d 764; *Macqueen Co. v. Comm'r Int. Rev.*, 67 F. 2d 857.)

Only *true income* can be considered in determining whether appellant was obliged by law to file an individual income tax return and the burden of establishing that funds received by appellant constituted *income*, was, of course, upon the prosecution. (*Gleckman v. U. S.*, 80 F. 2d 394; *Oliver v. U. S.*, 54 F. 2d 48; *Fenwick v. U. S.*, 177 F. 2d 488.)

Any circumstantial evidence equally consistent with the hypothesis of innocence as with guilt, must be viewed as supporting innocence and the burden of establishing that

appellant acted “wilfully,” that is, with the specific intent as regards the corrupt and criminal motive to avoid an obligation known to exist with which the act or omission was done, etc., was also upon the prosecution. (*U. S. v. Murdock*, 54 S. Ct. 223; *Spies v. U. S.*, 63 S. Ct. 364.)

The money advanced by Clawson to the corporation and thereafter received back by him, was not taxable as his personal income, and did not have to be declared by him in a personal return.

For example, in *Weaver v. Comm’r Int. Rev.*, 58 F. 2d 755 (C. C. A. 9), the principal issue was whether the money so paid to taxpayer was the repayment of a loan or a dividend. The facts were, in part, that the corporation was organized with capital stock of \$200,000.

Thereafter the stockholders of the corporation in order to increase its working capital, paid into the corporation the sum of \$100,000. The stockholders did not receive any shares of stock for this money. It was understood that at some future date the sum would be returned to them.

This Court held that this money when it was returned to the stockholders by the corporation did not constitute income. The Court said, at page 756:

“We see no basis here for taxation of this money on the theory that it is income. * * * The stockholders who advanced the money might be estopped from claiming a return of the money but as between the government and the stockholders the

actual transactions controlled in determining whether or not the money thus advanced and repaid is income within the meaning of the revenue act.”

Moreover, there is a presumption that a corporate officer acts for a corporation as an agent.

Thus in *Trippett v. C. I. R.*, 118 F. 2d 764, the Court held that where a corporation, the sole stockholders of which were its president and secretary-treasurer, adopted a resolution authorizing the president to transfer and convey an oil lease to the secretary-treasurer, and the lease was conveyed to the secretary-treasurer, but the corporation declared no liquidating dividend and was not dissolved or liquidated profits subsequently resulting from the sale of the lease by the president and the secretary-treasurer were profits of the corporation for purposes of determining income and excess profits taxes; that this was so because the corporate officers could not legally contract for the sale of the lease except as agents for the corporation.

In *S. A. Macqueen Co. v. Comm'r Int. Rev.*, 67 F. 2d 857, a corporation, pursuant to resolution passed by its three stockholders who were also directors, sold real estate to its president for \$85,000, and the board of directors accepted the offer of the president. The following day the president entered into an agreement with a third party to convey the real estate to him for a consideration of \$150,000. The profit accruing to the president from the second sale was distributed among the three stockholders pursuant to a declaration of trust executed by the presi-

dent in which he recited the transaction and his intention to distribute the profits to the stockholders in proportion to their holdings. The conveyances were duly executed and the profits were distributed accordingly.

The Court held in that case that where a corporation transferred realty to its president who reconveyed the property to a third party at a substantial increase in price and distributed the profits to other stockholders under a declaration of trust, the profit from the sale of realty, including the profit from the second sale, was taxable to the corporation.

Oliver v. United States, 54 F. 2d 48 (1931), was a case in which the defendant was convicted for failing to file a return. However, the Court had the following to say:

“Many transactions are shown in the evidence in which he (defendant) handled large sums of money. An examination of his bank accounts disclosed that a sum of money in excess of \$450,000 passed through such accounts during the three years in question. THIS ALONE, PERHAPS, IS NOT SUFFICIENT TO JUSTIFY THE CONCLUSION THAT ALL OF THIS WAS INCOME, * * *” (Emphasis ours.)

Gleckman v. United States, 80 F. 2d 394 (1935), was a case involving Section 145b. There the Court said in part:

“ . . . the bare fact standing alone, that a man has deposited a sum of money in a bank would not prove that he owed income tax on the amount; nor

would the bare fact that he received and cashed a check for a large amount in and of itself, suffice to establish that income tax was due on account of it.”

In *United States v. Fenwick*, 177 F. 2d 488 (1949), the government was prosecuting a defendant for tax evasion and the evidence it was relying on was the increase in net worth of the defendant. However, the Government in relying upon such circumstantial evidence, had not established with certainty the defendant's net worth at the beginning of the period in question. The Court held:

“ . . . when the government relies upon the circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion it must produce evidence that excludes ALL possible available sources of taxable income from which the increased net worth and the excess expenditures could have been derived.”

Quoting from *Bryan v. United States*, 175 F. 2d 223, 225, the Court said:

“ . . . it was essential for the Government to present evidence that excluded, or tended to exclude, all other available sources from which the additional funds expended could have been derived . . . The evidence, being circumstantial, must exclude every reasonable hypothesis other than the guilt of the Defendant . . . the case should not have been submitted to the jury since it did not exclude the hypothesis that the funds used in making some of the expenditures might have been from sources other than current business income.’ ”

And then concluding, the Court said:

“The defendant is not compelled to take the witness stand; he is not compelled to make proof that he is innocent, but he must be proved guilty by the evidence beyond all reasonable doubt, and where there is doubt that all the assets of defendant are included in the government’s computation of net worth, it follows that its computation can not be relied on.”

In *Hargrove v. United States*, 67 F. 2d 820 (C. C. A. 5th, Tex.), the Court held that in a prosecution for wilfully failing to report income and wilfully evading tax, defendant’s requested charge, though containing some inaccuracies and inadvertences, was sufficient to call the Court’s attention to the law of the case as to the element of wilfulness, rendering refusal to charge its substance error. *The Court held, in this case, that the “offense of wilfully failing” to make an income tax return, and of “wilfully” evading tax are not committed unless taxpayer has actual knowledge of existence of the obligation and wrongful intent to evade it.*

In *Spies v. United States*, 63 S. Ct. 364, 317 U. S. 492, 87 L. Ed. 418 (N. Y., 1943), the Supreme Court held that without the clearest manifestation of congressional intent, it would not assume that mere knowing and intentional default in payment of income tax, where there had been no wilful failure to disclose liability, was intended to constitute a criminal offense of any degree under sections of the Revenue Act referring to “wilful” failure to pay tax or make return or attempt to defeat tax, but that the Court would expect “wilfulness” to include some element

of evil motive and want of justification in view of all the financial circumstances of the taxpayer. The Court said, at page 497 (317 U. S. 492):

“The difference between wilful failure to pay a tax when due, which is made a misdemeanor, and wilful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. Both must be wilful, and wilful, as we have said, is a word of many meanings, its construction often being influenced by its context. *United States v. Murdock*, 290 U. S. 389, 54 S. Ct. 223, 78 L. Ed. 381. It may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of wilfulness. But in view of our traditional aversion to imprisonment for debt, *we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax where there had been no wilful failure to disclose the liability is intended to constitute a criminal offense of any degree. We would expect wilfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer.*” (Emphasis added.)

(b)

The Internal Revenue agents who were used as “expert” witnesses admittedly did not examine all of the pertinent financial dealings of the corporation or of appellant personally. [T. R. 342 ff.]

They were apparently content to make only a partial investigation, because of their adoption of the legal theory

that all that was needed in this case was a lifting of the corporate veil, partially. [T. R. 388-390.]

The theory of the agents in investigating the case was to treat the corporation as non-existent, as the "*alter ego*" of appellant, and to treat its operations as though they were the personal business transactions of appellant as an individual [T. R. 343-349], not even bothering to audit all of the corporation's books and records which the agent merely "looked over" [T. R. 344]; they did not examine the bank ledger sheets and records to ascertain the source of the money deposited to the corporation's account or to ascertain the nature of the financial transaction. [T. R. 345-349, 353, 368-369, 375-376, 378.] Nevertheless they were permitted to state conclusions and opinions on a basis lacking in required evidentiary support.

They took no account of any loans to the corporation [T. R. 395, 398, 400, 408-409, 410, 412, 421, 424], although they admitted that "if he (appellant) loaned money to the corporation, part of those withdrawals he made could be applied against the loans that he made to the corporation." [T. R. 398.]

They decided that the corporation's bank account was to be treated as though it were appellant's personal bank account, and made their computations and testified as to findings based upon these hypotheses as though they were provable facts. [See *e. g.*, T. R. 400-404.]

But the prosecution, after the evidence was all in, admittedly did not rely upon the "*alter ego*" theory at all. [T. R. 794-795, 801, 806, 807.]

To have offered much of the evidence ostensibly on the "*alter ego*" theory, while in fact not pressing that theory,

was highly prejudicial to appellant, and requires reversal of this case.

Moreover, examination of the evidence, tested by the law, shows that it is clearly insufficient to sustain the verdict on any theory.

The corporate entity is, of course, a fundamental part of our tax structure. The Internal Revenue Code, Section 3797(a)(3), defines corporations, and under the Code a separate tax is imposed on corporations (Internal Revenue Code, Sec. 13 *et seq.*). Many other references to corporations as such are found in the Code.

As early as 1918 the Supreme Court of the United States recognized the doctrine of separate corporate entity for tax purposes (*Lynah v. Hornby*, 38 S. Ct. 543). The famous case of *Eisnar v. Macomber*, 40 S. Ct. 189, holding that stock dividends were not income, rested upon a premise that a corporation is a separate corporate entity.

This position was reaffirmed in *Interstate Transit Lines v. Comm'r*, 63 S. Ct. 1279 (1943), and in the *Moline Properties* case, 63 S. Ct. 1132 (1943), when the Supreme Court upheld the separateness of the corporation against the argument that the gains of a corporation, organized to hold title to property by an individual at the suggestion of those from whom he bought the property, should be regarded as the individual gains of the sole stockholder. The Court said that the corporation was a distinct entity despite purely utilitarian and *alter ego* aspects of its existence. (See also *Harwood v. Eaton*, 68 F. 2d 12, and for California, *Wenban Estate v. Hewlett*, 227 Pac. 723.) Reference is made to California cases because the Court instructed the jury on California law in this connection.

In *Pickwick Corp. v. Welch*, 21 Fed. Supp. 664 (1936), the District Court for the Southern District of California reviewed several cases in which the doctrine was disregarded and then said:

“The doctrine of corporate entity is one of substance and validity. It should be ignored with caution and only when the circumstances clearly justify it. The theory of the *alter ego* has been adopted by the courts to prevent injustice, in those cases where the fiction of a corporate entity has been used as a subterfuge to defeat public convenience or to perpetuate a wrong; it should never be invoked to work an injustice or give an unfair advantage.” (Citing cases, including *Old Colony Trust v. Comm’r*, 69 F. 2d 699, and others.)

See also *Minifie v. Rowley*, 202 Pac. 673, in which it was said that the corporate entity might be disregarded if:

“The facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances sanction a fraud or promote injustice.”

Or, as was said in the *Wenban* case (above), the corporate entity will be disregarded when necessary to (1) redress fraud, (2) protect the rights of third persons, or (3) prevent a palpable injustice.

Before a corporate entity can be disregarded, it is not enough that the company is organized and controlled, and its affairs so managed as to make it “merely an instrumentality, conduit or adjunct of its stockholders, but it must further appear that they are the business conduits and *alter ego* of one another and that to recognize their separate entities would aid the consummation of a wrong.”

(*Erkenbacher v. Grant* (1921), 200 Pac. 641, cited and approved in many cases.)

It must be shown by evidence that the organization of the corporation or the act done is fraudulent or prompted by dishonesty or that the corporation committed or intended to commit a fraud or that injustice would be done if the separate entity were not disregarded. (See *Minifie* case, *Erkenbacher* case, *Wenban* case, above.) Therefore this doctrine may be invoked only by pleading and proving the facts.

See also:

Corning Glass Works v. Comm'r, 9 B. T. A. 771;

Corning Glass Works v. Lucas, 37 F. 2d 798, 68 A. L. R. 736, 50 S. Ct. 348;

New Colonia Ice v. Helvering, 54 S. Ct. 788;

Eichelberger, et al. v. Arlington Building, Inc., 280 Fed. 997 (1922).

With regard to tax matters similar rules obtain. The corporation is recognized even when wholly owned by persons who would be otherwise taxed.

For instance, in *Comm'r Int. Rev. v. Montgomery*, 144 F. 2d 313, the defendant, a contractor, agreed to provide materials and perform all work in building a certain building. During the period of construction he assigned the contract to a corporation consisting of himself, his wife and three children (he taking two voting shares, his wife one, and 97 non-voting to his children). The profits on the work completed as of the time of the assignment to the corporation was included in his individual return. The profits on work done afterward were returned by the corporation. It was this last move that was in dispute.

The Court there held the procedure to be a legal one. The Court pointed out that the corporation conducted itself like a corporation, that it kept books, paid corporation taxes, and the profits arising from the assigned contract were regularly returned as income by the corporation and dividends were regularly declared to the stockholders and returned for them as their income.

In the instant case *Clawson Enterprises, Inc.*, kept books, paid various taxes, etc. However, it had no profits, only losses.

Thus, in tax matters "the tendency is not to ignore the corporate entity unless it be used to defraud, but rather when natural persons are using corporate forms to do their business, they and their corporations are held to the literal consequences." (*Bancker v. Comm'r*, 76 F. 2d 1, 2, cited with approval in *Comm'r v. Moline Properties*, 131 F. 2d 388, 389 (1942).)

In cases in which the courts have disregarded the corporate entity it was done on the primary ground that the corporation was organized only to set up a distinct entity and as a shell, without any true business function.

And in order to hold individuals upon a theory disregarding the corporation as a fiction, appropriate facts must be pleaded to show a cause of action against the individuals and not against the corporation or against both. (*Nelson v. Parker*, 286 Pac. 1078; *Minifie* case, above.)

Also, the corporate entity is not to be disregarded solely because the ownership of stock is concentrated in one man. (See *Minifie*, *Erkenbacker*, *Wenban* cases, above, and *Mills v. Richmond Co.*, 219 Pac. 465, and cases cited. For a fuller discussion of this subject, see 6a Cal. Jur. 78, note 13.)

The corporate entity may not be disregarded upon a mere showing that the individual sole-owner and the corporation are for all intents and purposes but one and the same. “. . . THERE MUST BE A FURTHER SHOWING THAT AS A RESULT OF THE DOUBLE RELATIONSHIP FRAUD OR INJUSTICE WILL INURE TO A THIRD PERSON . . .” (*Wenban* case, *supra*.)

See *Comm’r v. Court Holding Corp.*, 324 U. S. 331, in which husband and wife formed a corporation. They sold its sole asset, an apartment house. Negotiations began while the corporation existed. The corporation was dissolved before the negotiations were completed. The Tax Commissioner taxed the corporation. This was *sustained* by the Supreme Court on theories which militate against the prosecution’s theory of the law in the instant case.

Whenever a person receives funds while acting as agent of the corporation, the benefits adhere to the corporation. (*Wichita v. Comm’r*, 162 F. 2d 513; *Fairfield S. S. Corporation v. Comm’r Int. Rev.*, 157 F. 2d 321.)

And even if appellant illegally held the proceeds of the sale of the restaurant and the “Artemis,” the income could not be regarded as his individual income for income tax purposes. (*Comm’r v. Wilcox*, 66 S. Ct. 546.)

Even a change of legal business form to avoid payment of taxes, is legal. (See *e. g.*, *Chisholm v. Comm'r*, 79 F. 2d 14; *Weeks v. Sibley*, 269 Fed. 155.)

“The right to change the status of an organization, or to dissolve an organization in any legal manner, is not made ineffectual because the motive impelling the change is to reduce or avoid taxation in the future.” (*Weeks* case, *supra*.)

B.

The District Court erred in denying appellant's motion [C. R. 4-7] for a Bill of Particulars. [C. R. 8.]

C.

The District Court erred in refusing to entertain appellant's motion [C. R. 9-12] for return of illegally seized property and for the suppression of evidence. [C. R. 13, lines 15-16; p. 14, lines 21-22; T. R. 48-.....]

Appellant should have been permitted to present his motion to adduce evidence and to take all other steps necessary to show the facts upon which the motion was based. [C. R.]

The books and records in question were subsequently used extensively by the prosecution in proof of its case. [See *e. g.*, Government Exs. 10, 11, 17, 18, 19, 40, 41-A, 41-B, 42-48.]

Such a fundamental right should not have been denied to him. The denial constituted denial of due process. (Rule 41 (a), (b), (c), (d) and (e), *Federal Rules of Criminal Procedure*; Amendments IV, V and VI, *Con-*

stitution of the United States; Silverthorne Lumber Co. v. U. S., 251 U. S. 385; *Meeks v. U. S.*, 232 U. S. 383; *Gouled v. U. S.*, 255 U. S. 298; *Agnello v. U. S.*, 269 U. S. 20; *Gambino v. U. S.*, 274 U. S. 310.)

D.

The District Court erred in permitting the prosecution to introduce the following evidence:

(a) All the testimony and evidence relating to the stock issuance applications, incorporation of and dealings by Clawson Enterprises, Inc.

(b) Expert opinion of internal revenue agents, which was without foundation, based on erroneous view of the law and based in part on material outside the record. [T. R. 340 ff.]

(c) The entire testimony of Government witness John H. Whalen. [T. R. 122-196, 325-326.]

(d) Hearsay testimony as to statements by Mr. Hicks [T. R. 355] and others. [T. R. 371-372.]

(e) Hearsay testimony of Mr. Whitecotton. [See "J" below, and Government Exs. 52, 53 and 54.]

E.

The District Court erred in refusing to accord to appellant the opportunity of obtaining evidence to refute matters improperly placed before the jury as to which appellant was caught by surprise, as developed by the hearsay testimony of Mr. Whitecotton and by Government Exhibits 52, 53 and 54. [Tr. R. 701-702, 712-713, 720-723, 731, 761-765, 785-786.]

F.

Appellant was denied due process by virtue of the action of the prosecutor in shifting his theory of the case after all of the evidence was in the record.

Much of the evidence came into the record on the "*alter ego*" theory. This theory was abandoned by the Government. The presence of this evidence and the shift in the prosecution's theories resulted in a denial of due process to appellant.

G.

The Court erred in giving to the jury the following instructions presented by the Government.

(a) GOVERNMENT'S INSTRUCTION No. 2.

If you find that there were any gains, profits, or income received by the defendant which were not reported, it makes no difference as far as the question of taxability is concerned whether such income was lawfully received or unlawfully received, inasmuch as both were taxable and should have been reported.

(b) GOVERNMENT'S INSTRUCTION No. 5.

Every individual having for the taxable year 1946 a gross income of \$500 or more shall make a return which shall contain or be verified by a written declaration that it is made under the penalties of perjury. Such return shall set forth in such cases, and to such extent, and in such detail, as the Commissioner with **the** approval of the Secretary may by regulations prescribe, the items of gross income and the deductions and credits allowed under this chapter, and such other information for the purpose of carrying out the provisions of this chapter as may be prescribed by such regulations.

(c) GOVERNMENT'S INSTRUCTION No. 6.

The gist of the offense charged in the information is wilful failure on the part of the defendant to file a return. To establish this charge, the Government must prove (1) that the defendant was a person required by law to make a return for the year 1946; (2) that he failed to file a return for that year at the time required by law; and (3) that the failure to file such return was wilful.

(d) GOVERNMENT'S INSTRUCTION No. 8.

Wilful failure to make a return when one is required is a misdemeanor without regard to existence of a tax liability.

(e) GOVERNMENT'S INSTRUCTION No. 9.

Every person subject to income tax, "except persons whose gross income (1) consists solely of salary, wages, or similar compensation for personal services rendered, or (2) arises solely from the business of growing and selling products of the soil, shall, for the purpose of enabling the Commissioner to determine the correct amount of income subject to the tax, keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of the gross income and the deductions, credits, and other matters required to be shown" in an income tax return.

(f) GOVERNMENT'S INSTRUCTION No. 10.

"Wilful," in the statute *which makes a wilful attempt to evade taxes a crime, refers to the state of mind in which the act of evasion was done.*

It includes several states of mind, any one of which may be the wilfulness necessary to make up the crime.

Wilfulness includes doing an act with a bad purpose; it includes doing an act without a justifiable excuse. It includes doing an act without ground for believing that the act is lawful, and it also includes doing an act with careless disregard for whether or not one has the right to so act.

(g) GOVERNMENT'S INSTRUCTION No. 17.

You are instructed that under the income tax laws the term "dividend" means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year without regard to the amount of the earnings and profits at the time the distribution was made.

(h) GOVERNMENT'S INSTRUCTION No. 18.

You are instructed that if you find from all of the evidence that the defendant was the real owner of substantially all of the stock of the corporation known as Clawson Enterprises, Inc., and used funds belonging to that corporation for his own personal use, you may find that such use constituted the use of a dividend constructively received by him from such corporation, even though no formal declaration of dividend was made by the corporation, as such declaration is unnecessary where substantially all the stock of the corporation was owned by a single individual.

(i) GOVERNMENT'S INSTRUCTION No.

You are also instructed that substance and not form controls in the application of income tax laws which deal with realities and looks at entire transactions and, further, that any distribution made by a corporation to its shareholders out of its *earnings or*

profits accumulated since 1913 *is a dividend*, a formal declaration of dividend by a corporation not being essential.

(j) GOVERNMENT'S INSTRUCTION No. 21.

You are instructed that payments made by a corporation out of its earnings or profits may be taxable to the shareholders as dividends, even though (1) they purport to be based upon a consideration and are not designated as dividends; (2) they are not in proportion to stockholdings; or (3) there is no formal declaration of a dividend.

H.

The Court erred in refusing to give to the jury the following specific instructions requested by appellant:

(a) DEFENDANT'S INSTRUCTION No. 2.

It is not charged that Clawson Enterprises, Inc., or Clawson's Restaurant, or the Crenshaw Mirror, or the Clawson-Miller Publishing Co., or the boat "Artemis," or the vessel "Conqueror" filed or were required to file any income tax return or to pay any income tax to the Government for the year 1946. [C. T. 16.]

(b) DEFENDANT'S INSTRUCTION No. 3.

It is immaterial whether or not Clawson Enterprises, Inc., had any income during 1946. [C. T. 17.]

(c) DEFENDANT'S INSTRUCTION No. 8.

The losses or expenses of a corporation cannot be deducted by its sole stockholder from his personal income in determining his income tax, or vice versa. [C. T. 17.]

(d) DEFENDANT'S INSTRUCTION No. 9.

Nor can the receipts of a corporation be chargeable to its stockholders or sole stockholder for income tax purposes. [C. T. 17.]

(e) DEFENDANT'S INSTRUCTION No. 11.

The Court is requested to give its standard instructions on reasonable doubt, on circumstantial evidence, on the meaning of "wilfully" as defined in the *Murdock* and *Spies* cases, presumption of innocence. [C. T. 17.]

(f) DEFENDANT'S INSTRUCTION No. 12.

You cannot find that the defendant acted wilfully if he did not understand clearly the requirements of the law as they applied to him in connection with income tax returns for 1946. [C. T. 17.]

(g) DEFENDANT'S INSTRUCTION No. 13.

You cannot find that the defendant acted wilfully if he is shown to have honestly believed that under the circumstances presented in this case he did not have to file any return for 1946, or if he relied upon the advice of an accountant or an attorney as to his rights and obligations in that regard. [C. T. 18.]

(h) DEFENDANT'S INSTRUCTION No. 18.

Money misappropriated, embezzled or stolen does not constitute income, either gross or net, to the person who misappropriates, embezzles or steals the money in question. [C. T. 18.]

(i) DEFENDANT'S INSTRUCTION No. 19.

If the defendant is found by you to have taken funds of Clawson Enterprises, Inc., in 1946 for his own personal use, without being duly authorized or

empowered to do so by the corporation, you cannot include funds so taken by him as a part of his income, if any, for 1946, since such an unauthorized taking of money would constitute theft or embezzlement on his part. [C. T. 18.]

(j) DEFENDANT'S INSTRUCTION No. 22.

You are not permitted to guess or speculate as to whether any of the money which may be shown to have passed into Clawson's hands in 1946 was actually income.

Unless the Government proves beyond a reasonable doubt that money received by Clawson actually was income to him and that he knew it was income and received or accepted it as income, you must find Clawson not guilty in this case. [C. T. 19.]

(k) DEFENDANT'S REQUESTED INSTRUCTION No. 25.

There is no evidence in this case that the corporation was ever dissolved or liquidated, and there is no evidence whatsoever that any dividends were declared or paid by the corporation. [C. T. 19.]

(l) DEFENDANT'S REQUESTED INSTRUCTION No. 26.

Any income received from the sale of the restaurant and bar or the boat "Artemis" was income of the corporation and not of the defendant personally. [C. T. 19.]

(m) DEFENDANT'S REQUESTED INSTRUCTION No. 23.

You are not bound to accept the testimony or opinion of any government agent or expert regarding any of the matters as to which he may have testified as an expert, or as to which he gave an opinion.

You may disregard the entire testimony of the expert in that regard.

You must disregard the opinion of an expert witness if it is shown that the witness did not take into account all of the facts concerning the financial matters which involved the defendant in this case. [C. T. 22.]

(n) DEFENDANT'S REQUESTED INSTRUCTION No. 24.

You are not permitted to speculate or guess as to whether any funds received by the defendant personally constituted income.

The Government must prove beyond a reasonable doubt that any such funds received by the defendant actually constituted income, and did not constitute the repayment of a loan, etc. [C. T. 22.]

(o) DEFENDANT'S REQUESTED INSTRUCTION No. 25.

There is no evidence in this case that the corporation was ever dissolved or liquidated, and there is no evidence whatsoever that any dividends were actually declared or paid by the corporation. [C. T. 23.]

(p) DEFENDANT'S REQUESTED INSTRUCTION No. 26.

Any income received from the sale of the restaurant and bar or the boat "Artemis" was income of the corporation and not of the defendant personally. [C. T. 23.]

(q) DEFENDANT'S REQUESTED INSTRUCTION No. 27.

The doctrine of corporate entity cannot be ignored.

The theory of the *alter ego* can be utilized only in order to prevent injustice, where the corporation has been used as a subterfuge to perpetuate a wrong or to defraud. [C. T. 23.]

(r) DEFENDANT'S REQUESTED INSTRUCTION No. 28.

The doctrine of corporate entity fills a useful purpose in business life. Whether the purpose be to gain an advantage under the law of the state of incorporation or to avoid or to comply with the demands of creditors or to serve the creator's personal or undisclosed convenience, so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity. [C. T. 23-24.]

(s) DEFENDANT'S REQUESTED INSTRUCTION No. 29.

The corporate *form* must be unreal or a sham before the Treasury may disregard it.

Whatever may have been the purpose of organizing the corporation, so long as that purpose is the equivalent of business activity, or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity. [C. T. 24.]

I.

The Court should have granted the motion for a new trial. [C. R. 32-35, 36.]

The questions presented on this appeal as to procedural steps and violations of appellant's due process rights discussed previously disclosing the necessity for reversal, were to a large extent presented to the lower Court upon the motion for a new trial. [C. R. 32-35.]

The District Court erred in denying that motion. [C. R. 36.]

J.

The District Court erred in admitting into evidence the second-degree hearsay testimony of Dr. George O. Whitecotton [T. R. 647-665] and in admitting the hearsay medical record document, Government's Exhibits 52, 53 and 54. Also, the documents 53 and 54 were privileged since the person to whom the medical records referred, who was then 86 years of age [T. R. 662] had not waived her privilege and the prosecution therefore illegally obtained and utilized it. ¶[T. R. 648.]

Moreover, the 1937 matter had no relation to any issue before the Court.

The District Court received this document in evidence [Government Ex. 52, T. R. 668] and permitted Dr. Whitecotton to testify concerning its terms although he admitted that the financial information furnished was based on Mrs. Name's statements and he admitted also that the very hospital record he was using as the sole basis for his testimony stated that Mrs. Names was then 86 years af age, and was "senile," "confused" [T. R. 647-648, 658 *ff*], "incoherent," "unreliable," "forgetful" to the extent that she disclaimed having a daughter.

K.

In the light of the circumstances disclosed by the entire record, the sentence imposed upon defendant was clearly excessive. This Court has the power to, and should reduce that sentence.

Conclusion.

The judgment below should be set aside with instructions to the District Court to enter a verdict and judgment of not guilty. In the alternative, the judgment should be set aside and appellant granted a new trial. The sentence should be set aside.

Respectfully submitted,

STRONG & SCHWARTZ,

By WILLIAM STRONG,

Attorneys for Appellant.

No. 13105

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RAYMOND W. CLAWSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

FILED

MAR 28 1952

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No. 13105

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RAYMOND W. CLAWSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

I.

Jurisdiction.

Appellant was charged in an Information with the failure to file an individual Income Tax Return under the Internal Revenue Code, Section 145(a) of Title 26, United States Code. The District Court had jurisdiction under Section 3231 of new Title 18, United States Code. The offense was committed in the Southern District of California. Judgment was entered against the appellant on May 21, 1951, and on the same day Notice of Appeal was filed. This Honorable Court has jurisdiction under Sections 1291 and 1294 of Title 28, United States Code.

II.

Statutes Involved.

Section 145(a) of Title 26, United States Code, provides, in part, as follows:

“Failure to file Returns. Any person required under this chapter * * *, or required by law or regulations made under authority thereof to make a return * * * who wilfully fails to * * * make such return * * * at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor, and upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than one year, or both, * * *.”

Section 51(a) of Title 26, United States Code, provides, in part, as follows:

“Individual Return

“(a) Requirement—Every individual having for the taxable year a gross income of \$500 or more shall make a return * * *.”

III.

Statement of the Case.

An Information was filed against the appellant in the United States District Court for the Southern District of California, Central Division, on March 14, 1950 [C. R. 1],¹ charging that appellant had failed to file an Individual Income Tax Return for the year 1946 as required by law. Appellant was arraigned and entered a plea of not guilty,

¹The references “C. R.” are to the clerk’s transcript on appeal; the references “R.” are to typewritten transcript testimony on appeal; the references “Ex.” are to exhibits.

and thereafter a jury trial was had resulting in a verdict of guilty as charged [C. R. 31]. After denying appellant's Motions for Acquittal and for New Trial [C. R. 36], the Trial Judge on May 21, 1951, sentenced appellant to imprisonment in an institution of the jail type for a period of one year [C. R. 37].

IV.

Statement of Facts.

The appellant, in November, 1943, negotiated for and purchased a restaurant known as "Kalis" [R. 276, lines 14-20; 277, lines 3-23; 278, lines 3-6 and 21-25; Ex. 3-D-2, 40, 49-B], for the sum of \$11,000 [R. 532, lines 22-24; 533, lines 14-16; 608, lines 8-11; 638, lines 17-19; 640, lines 5-9], making a down payment of \$5,300, which he received from his wife, but which was really his money [R. 640, lines 12-14], the balance of \$5,700 to be paid in monthly installments [R. 41, lines 19-25; 44, lines 8-17; Ex. 49-C]. Appellant concealed his ownership of the restaurant and liquor license by putting them in the name of Waldemar Johanson, his stepfather [R. 534, lines 5-13; 543, lines 18-25; 607, lines 13-16], because he had been convicted of a felony [R. 637, line 25; 638, lines 1-10].

In February, 1944, appellant organized a corporation under the laws of the State of California under the name of "Clawson Enterprises, Inc." The first and only directors and officers were: Appellant Raymond W. Clawson, President and Director; Kathleen Clawson, Vice President and Director; Charles E. Hicks, Secretary and Treasurer; Waldemar Johanson, Director [Ex. 1-B]. In the application to the Commissioner of Corporations for the State of California for the issuance of stock, Charles

E. Hicks, under oath, represented that he was the owner of the restaurant equipment which was being transferred to the corporation for 117 shares of stock [Ex. "E" attached to Ex. 1-B]. The inventory list of the equipment attached to the said application is a carbon copy of the list of the equipment purchased by the appellant, Raymond W. Clawson, in November, 1943 [R. 637, lines 18-19; 643, lines 17-22; Ex. D attached to Ex. 1B, Ex. 49E]. Appellant put the 117 shares of stock in Mr. Hicks' name for the reason that he did not want to have an attachment against him [R. 641, lines 17-23]. Mr. Hicks did not pay for, or claim to be the owner of, the 117 shares of stock, but was holding the stock in his name for the appellant [R. 220, lines 14-25; 229, lines 20-22; 230, lines 3-4 and 5-12]. Although one share each was issued in the name of appellant, Raymond W. Clawson, Waldemar Johanson and Kathleen Clawson, the stock was never delivered to them but remained in the stock book [Ex. 18]. The 120 shares of stock were paid for by the transfer to the corporation of the restaurant equipment owned by the appellant [Ex. 10, Acct. No. 1200—Assets]. The appellant was the owner of all of the assets of the restaurant, and he operated it as a corporation [R. 332, line 1; 707, lines 11-16].

Subsequently, in March, 1946, all of the assets of the corporation were sold for \$40,000 cash, at which time the corporation ceased to do business and no further Board of Directors meetings were held [R. 150, lines 20-25; 401, lines 14-15, 19-21; Exs. 10, 11, 23, 24, 36, 37, 41-B]. However, the appellant used some of the cash for his personal uses, drawing checks upon the corporation bank account paying his rent, life insurance, clothing, hotel bills and the like, having drawn between May and December of 1946 for these purposes the amount of \$11,212.05 [R.

625-636; 699, lines 9-23; 700, lines 1-2 and 19-23; Ex. J-2].

A part of the \$40,000 which was received from the sale of the assets of the corporation was used by the appellant as follows:

\$9,500 for the purchase of the yacht, "ARTEMUS" in March, 1946 [R. 697, lines 2-18; Exs. 8-A, 8-B];

\$8,782.60 for improvements on the yacht [R. 60-75; Exs. 25, 26, 27 and 28];

\$12,000 to his ex-wife, Phyllis Clawson, to purchase a home and furniture [R. 481, lines 1-11; 556, lines 18-25; 557, line 1; 580, lines 12-15].

Appellant was the owner of the yacht ARTEMUS although it was in his wife's name [R. 27]. In September, 1946 he sold the yacht ARTEMUS for \$57,750, and had the checks made payable to himself, explaining that the yacht was in his wife's name for business reasons [R. 26, lines 10-11; 31, lines 18-23; 334, lines 1-9; 335, lines 8-10; Exs. 33-A, 33-B and 34]. A part of the \$57,750 was used by the appellant as follows:

\$16,750 for the purchase of the yacht CONQUEROR in November, 1946 [R. 597, lines 1-11];

\$8,000 to pay off personal loans to the Sunset and Vine Loan Co. [R. 82, lines 20-25; 574, lines 1-5; 699, lines 9-23; Exs. 31-B, 50-A, B, C];

\$11,000 to pay off personal indebtedness to the Auto Finance Co. [R. 102, lines 13-25; Exs. 9-A, C, 31-C, 38, 39-A-C];

\$8,000 to pay off personal indebtedness to Markwell and Co. [R. 107-120; Exs. 29A-1, 30].

The appellant being the actual owner of all the outstanding stock of the corporation [R. 332, line 1; 707, lines 11-16] received from the sale of the assets of the corporation in the nature of constructive dividends the sum of \$24,416.66 in the year 1946 [R. 388, lines 14-15; 389, lines 7-8], and from the sale of the yacht ARTEMUS \$20,377.35, as a long term capital gain, making a total of \$44,794.01, and divided upon the community property basis, income in the amount of \$22,397.01 for the year 1946 [R. 390, lines 13-20; 418, lines 9-19]. The appellant admitted that although he was aware of the requirement to file an income tax return [R. 622, lines 14-19; 691, lines 12-21] he did not file one for the year 1946 although his gross income was in excess of \$500 [R. 620, lines 6-7; 622, lines 14-19; 691, lines 12-21].

V.

Questions Involved.

1. Did the appellant have a gross income of \$500 or more for the taxable year 1946?
2. Was the money which was withdrawn from the corporation bank account by the appellant, and used by him, a constructive dividend?
3. Was the profit from the sale of the yacht ARTEMUS income to the appellant?

VI.

Summary of Argument.

The appellant seeks appellate review upon the statement of facts unwarranted by the evidence as adduced in the trial court. His entire argument is therefore predicated upon his erroneous statement of the facts and should be disregarded. The Government's argument is predicated upon a recital of the facts established by the direct evidence. The lower court gave proper and adequate instructions to the jury. In brief, the jury was instructed that they must consider all of the evidence in determining whether the appellant had a gross income of \$500 or more for the taxable year 1946 and whether he wilfully failed to file a return. The verdict of the jury is amply supported by the evidence.

VII.

ARGUMENT.

A.

There Is Sufficient Evidence to Support the Verdict.

The Government's Statement of Facts, *supra*, is a recital based upon the direct evidence adduced at the trial. The facts as stated are those which the jury were entitled to believe and find. Upon appeal the court must view the facts, including not only direct evidence but also all references reasonably and justifiably to be drawn therefrom, in the light most favorable to the Government. The appellant's view of the evidence may not be considered because it was rejected by the jury. We, therefore, submit that the appellant's Statement of Facts must be disregarded on appeal. The only question on appeal with regard to evidence is whether there is any substantial

evidence to support the verdict. There was ample evidence of the crime to support the jury's verdict. The appellant was the sole owner of all the equipment transferred to Clawson Enterprises, Inc., a corporation, for 120 shares of its capital stock. He owned all the outstanding shares of capital stock and had complete control of the corporation. The corporation served no real business purpose except as a passive dummy and mere instrumentality of the defendant. In civil tax cases it has been held that the Government may look at the actualities, and upon determination that the form employed for doing business is unreal, may disregard the fiction. It is the command of income and its benefits which indicates the real owner of property. See:

Lucas v. Earl, 281 U. S. 111;

Gregory v. Helvering, 293 U. S. 465, 469;

Higgins v. Smith, 308 U. S. 473, 477, 478;

Griffith v. Commissioner, 308 U. S. 355, 357, 358;

Harrison v. Schaffner, 312 U. S. 579, 580;

Commissioner v. Smith (2 Cir. 1943), 136 F. 2d 556, 559;

Pacific Magnesium v. Westover (9 Cir.), 183 F. 2d 584.

In order to sustain the verdict of guilty, all that is necessary is that the appellant have a gross income of \$500 and that he wilfully failed to file a return. The appellant contends that the Revenue Agents made only a partial investigation, and that they treated the appellant as the *alter ego* of the corporation. The record completely refutes the appellant's contention [R. 349, lines 19-25; 350, lines 1-4; 388, lines 9-15; 389, lines 7-9 and 18-19; 390, line 13].

The Revenue Agents inspected the books and records incidental to their investigation in order to determine whether the corporation had an earned surplus in 1946 [R. 420, lines 23-24; 422, lines 15-23]. The evidence disclosed an earned surplus of at least \$24,416.66 which was withdrawn by the appellant as a constructive dividend to the sole shareholder [R. 388, lines 9-15; 389, lines 7-9 and 18-19; 390, line 13]. It is clear, contrary to appellant's contention, that the books of Clawson Enterprises, Inc., did not show that it borrowed any money [R. 171, lines 4-16; 394, lines 1-5; 395, lines 9-13; Exs. 10, 11], and the appellant's contention that the Revenue Agent should have considered personal loans in arriving at the earned surplus of the corporation, is without merit. The cases on which the appellant relies are not in point and need not be discussed.

In the case of *Currier Lumber Co. v. United States* (1st Cir.), 166 F. 2d 346, the facts were very similar to those of this case, and the court considered the precise question of fact which was raised here. In that case Currier was the President, Treasurer, Director and owner of 75 per cent of the stock. The balance of the 25 per cent of the stock was in his wife's name. He deposited in his personal account checks payable to the corporation received in payment of merchandise sold by the corporation.

The court found that an essentially individual ownership was being run in corporate form and that Currier received constructive dividends which he was under no obligation to repay, and was sufficient to uphold the con-

viction under Section 145(b) of Title 26, United States Code, for attempting to evade and defeat the taxes by filing a false income tax return.

Since the government, in the instant case, predicates a part of its case upon the constructive dividend theory, and the jury having found appellant guilty, it is sufficient in itself to uphold the conviction. The monies which he withdrew from the corporation bank account for his personal uses were not secured by a note, or otherwise. At the time he withdrew the money the corporation had a substantial surplus, and there was no evidence that appellant was obligated to make repayment. From these facts the jury had the right to conclude that the money which appellant took from the corporation bank account was rightfully his. See *Chan Shing Ho v. United States* (C. C. A. 9, 1951), 186 F. 2d 574.

In the civil tax case of *Clark v. Commissioner of Internal Revenue*, 84 F. 2d 725, where profits of a corporation were transferred by direction of a sole stockholder to a trust created for his children, the court quoted the decision of the Tax Court with approval, said:

“He enjoyed the use of the property, having it transferred for his own purposes. This was the use he wanted to make of the property. He would have enjoyed it no more had it been distributed to him directly.”

In addition to the constructive dividend the appellant derived a profit in the amount of \$20,377.35 from the purchase and sale of the yacht ARTEMUS in the calendar

year of 1946 [R. 390, lines 16-18]. Either one of these items of income standing alone is sufficient to support the jury's finding of guilty. See: *Stillman v. United States*, 177 F. 2d 607, 616.

B.

No Abuse Shown in Denying Appellant's Motion for Bill of Particulars.

Appellant's contention that the denial by the court of his Motion for a Bill of Particulars was error, is without merit. The Information specifically states that the appellant had received gross income of \$22,397.01 during the taxable year 1946, and it fully advised him that he had not filed a return having a gross income in excess of \$500. By reason of the transactions in receiving moneys from the corporation and profit from the sale of the yacht ARTEMUS, the appellant was in possession and had knowledge of the information concerning his gross income. No error was committed by the action of the court below in this case since the granting of a Bill of Particulars is a matter of discretion of the trial court. See: *Himmelfarb v. United States* (9 Cir.), 175 F. 2d 924, 934-935, cert. den. 338 U. S. 860; *Maxfield v. United States* (9 Cir.), 152 F. 2d 593; *United States v. Kushner* (2 Cir.), 135 F. 2d 668, cert. den. 320 U. S. 212; *O'Connor v. United States* (9 Cir.), 175 F. 2d 477, 478; *United States v. Chapman* (7 Cir.), 168 F. 2d 997, 999, cert. den. 335 U. S. 853; *Morandy v. United States*, 170 F. 2d 5 (9 Cir.), cert. den. 336 U. S. 938; *Stillman v. United States* (9 Cir.), 177 F. 2d 607, 615.

C.

No Prejudice Has Been Established in Denying Appellant's Motion for Return of Property and to Suppress Evidence.

The appellant filed a motion on day of trial to suppress the evidence claimed to have been unlawfully seized; there was no showing that he did not have an opportunity to make the motion before trial, as required by Rule 41(e) of the Federal Rules of Criminal Procedure. The burden of showing prejudice resulting from the denial of such a motion is upon appellant. See: *Goldstein v. United States* (C. A. 8, 1933), 63 F. 2d 609, 614; *Mansfield v. United States* (C. A. 8, 1935), 76 F. 2d 224, cert. den. 296 U. S. 601. Nor did appellant make any legal showing, as required by Rule 41(e), that the evidence was unlawfully seized. Furthermore, during the trial it developed that the books and records were those of the corporation and were voluntarily submitted to the Revenue Agents [R. 332, lines 14-17; 340, lines 23-24]. Therefore, there is no merit to appellant's contentions.

D.

The Court Did Not Err in Permitting the Introduction of Certain Evidence.

The appellant, without argument, calls upon the court to examine for itself the specifications of error under D(a) to (e) inclusive and to decide from that examination that the matters therein specified are grounds for reversal of the conviction (App. Op. Br. 20). Since the appellant has not seen fit to point out wherein he has been prejudiced, we do not deem it necessary to comment upon these grounds. See: Rule 20(2)(d); *Ziegler v. United States* (9 Cir.), 174 F. 2d 439; *Mosca v. United*

States (9 Cir.), 174 F. 2d 448. We submit that as to each unargued specification of error, there is no merit and that the examination of the record will not disclose any reversible error.

E.

No Resulting Prejudice Has Been Established by Appellant.

Likewise, the appellant, without argument or citation of authority in Point E does not point out prejudicial error in support of his contention. This specification needs no argument, and is without merit.

F.

Appellant Was Not Denied Due Process.

The appellant's contention that where testimony is ostensibly introduced on the theory of *alter ego* and then abandoned, it was prejudicial finds no support in the record or in law, appellant having cited no authority for this proposition. The jury, which had exclusive power of drawing the necessary inferences from the evidence before it and determining the ultimate facts, was fully justified in reaching the verdict that appellant was guilty as charged in the Information.

G and H.

The Court Acted Properly in the Instructions Given and Refused.

Examination of the Instructions actually given to the jury discloses that every material proposition of law was given by the court in its Instructions. The specific Instructions refused were either not proper statements of law supported by the facts or they were covered by other

Instructions. Under the Instructions given by the court, the burden of proof was on the Government to establish, beyond a reasonable doubt, that the appellant, during the time alleged in the Information, was a person required to make a return for the year of 1946; had a gross income of \$500 or more, and that the failure to file a return was wilful [R. 810, lines 1-20; 816, lines 3-22; 817, lines 8-20; 821, lines 12-19; 823, lines 17-21; 824, lines 1-21]. The jury found against the appellant. The court thereby afforded appellant all the protection, and more, which he sought by the Instructions requested and refused. See: *Murdock v. United States*, 290 U. S. 389, 395; *United States v. McCormick* (C. C. A. 2d), 67 F. 2d 867, cert. den. 291 U. S. 662, 26 U. S. C. 145(a).

I.

The Motion for New Trial Was Properly Denied.

We have already commented on appellant's contention as to violation of his rights, and it is without merit.

J.

The Court Did Not Err in Admitting in Evidence the Hospital Record of Sarah Names.

The hospital record was admissible to rebut the appellant's testimony that his grandmother Sarah Names was a woman of wealth. The document is a public record made in the usual course of business. It was signed by the deceased, Sarah Names [R. 731, line 25; 732, lines 1-4]. Its weight was for the jury (28 U. S. C. 1732). Questions of rebuttal testimony are within the sound discretion of the trial judge. See: *United States v. Riccardi* (C. C. A. 3d), 174 F. 2d 883, 890; *Williams v. United States* (C. C. A. 4th), 151 F. 2d 736, 737.

K.

The Sentence Was Not Excessive.

Under Section 145(a) of Title 26, United States Code, the failure to file a tax return is a misdemeanor, and the maximum penalty is one year, or a fine of \$10,000, or both. It cannot be said that the sentence, without a fine, is excessive.

VIII.

Conclusion.

There was substantial evidence that the appellant had a gross income of at least \$500 for the year 1946, and that he wilfully failed to file a return. The District Court gave proper instructions, and the verdict is amply supported by the evidence. The Judgment should be affirmed.

Respectfully submitted,

WALTER S. BINNS,
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RAY H. KINNISON,
Assistant United States Attorney,
Chief of Criminal Division,

BERNARD B. LAVEN,
Assistant United States Attorney,
Attorneys for Appellee.

No. 13105

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RAYMOND W. CLAWSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

WILLIAM STRONG,

9441 Wilshire Boulevard,
Beverly Hills, California,

Attorney for Petitioner.

FILED

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No. 13105
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

RAYMOND W. CLAWSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

On August 28, 1952, this Court, Judges Mathews, Bone and Orr, rendered an opinion affirming the judgment of conviction of appellant and the sentence of imprisonment for one year.

Appellant respectfully petitions this Court for rehearing in this case for the reasons: (1) the monetary facts in this case are different from those stated in the opinion, and (2) the procedural errors before the District Court are sufficiently grave and prejudicial to require reversal of the conviction.

1. The Facts.

In its Opinion, this Court in substance held that in 1946 appellant personally received gross income of more than \$500, that Clawson Enterprises, Inc., was appellant's "dummy," that appellant received from this corporation some \$20,377.35 as direct income, and received constructive dividends which he was under no obligation to repay.

All of these findings and conclusions stem from the basic conclusion that appellant received or used *as income for 1946* the funds set forth in the Opinion.

This is not an income tax evasion case; it is only a failure to file case. Nowhere does the Government claim that a single cent of taxes is owed by appellant. Certainly if appellant earned the income which is attributed to him, appellant could have been indicted for an attempt to defeat and evade the payment of taxes. This was never done, and at no time was any demand made for any taxes whatsoever.

(a) We respectfully submit that a complete recapitulation of the Government-adduced and uncontradicted oral and documentary defense evidence discloses that the moneys involved did not constitute income in 1946.

The Opinion recites (p. 3, third par.) that after March 1946, the corporation ceased to do business. We respectfully submit that the record shows that the corporation continued to do business for at least two years thereafter, and that it acquired other assets during the latter period.

Appellant testified without contradiction that the corporation continued to operate after March, 1946 [R. 600, 612]. The corporation's bank accounts show hundreds of withdrawals and deposits until May 20, 1948 [Exs. F and M, J, K, R].

The Government stipulated that the corporation was never dissolved [R. 243]. Government witnesses Hicks and Cummins testified that in 1946 corporation funds were used to purchase and outfit the boat "Artemis" [R. 287-288, 387-389, 558-559, 587, Ex. B, 5]; the corporation acquired and operated the newspaper "The Crenshaw Mirror" [R. 288, Exs. P-1, P-2, P-3, P-4, Q, S, T, 317-318, 458-459, 587-589, 616-618]. Some of the proceeds from the later sale of the "Artemis" were redeposited into the corporation's account [R. 402-403].

The corporation was duly organized and existed under the laws of the State of California, with by-laws, stock, etc. [T. R. 217, 545-547; Govt. Exs. 1, 1-B, 17, 18].

It had two active bank checking accounts which at times required two signatures for the withdrawal of funds [T. R. 546; Govt. Ex. 5; Deft. Exs. F, G, M, J, K]. It made hundreds of deposits and withdrawals totalling many thousands of dollars [T. R. 306-312; Govt. Exs. 20-22, 42-48; Deft. Exs. A-G, J, K, M]. It had books and records [Govt. Exs. 10, 11; T. R. 128-132, 199-210, 216, 297, 319-321, 542]. It had officers [T. R. 217, 244, 545-546] and numerous employees [T. R. 227, 244, 247; Deft. Exs. E-1 to E-5, H, I, L]. It engaged in various financial and commercial transactions, and paid numerous taxes [E. G., Govt. Exs. 5, 6, 7, 10, 11, 20, 21, 22, 23, 24, 25, 26, 27, 41-A, 41-B, 42-48; Deft. Exs. B, C, D, E-1 to E-5, F, G, H, J, J-1, K, M, N, O].

This Court concluded in effect from the evidence (Opin. p. 4) that Clawson Enterprises, Inc., was a mere dummy, and held that "the fact, and not the form, is decisive," and that the facts in this case "are reminiscent of, but even stronger than" those in *Currier v. United States*,

166 F. 2d 346 (1948), 1 Cir., and held that appellant received constructive dividends from that corporation.

We respectfully submit that Clawson Enterprises, Inc., was created and functioned for a period of more than five years in a manner and is no different from hundreds of other family-owned corporations whose existence as such is recognized by the Commissioner of Internal Revenue and the courts.

See, *e. g.*,

Lynch v. Hornby, 38 S. Ct. 543;

Commissioners v. Court Holding Corp., 324 U. S. 331;

Commissioner v. Montgomery, 144 F. 2d 313;

Interstate Transit Lines v. Comm'r, 63 S. Ct. 1279;

Commissioner v. Modine Properties, 63 S. Ct. 1132;

Harwood v. Eaton, 68 F. 2d 12;

Pickwick Corp. v. Welch, 21 Fed. Supp. 664;

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Bancker v. Comm'r, 76 F. 2d 1;

Corning Glass Works v. Comm'r, 37 F. 2d 798;

Eichelberger v. Arlington Bldg., Inc., 280 Fed. 997.

See also,

Internal Revenue Code, Section 3797(a)(3).

The Opinion states in effect (pp. 2 and 3) that appellant utilized various funds, mainly from the sale of corporate assets.

We respectfully submit that this was not income to appellant; it constituted a partial repayment of the money he had advanced to the corporation in prior years, a total sum in excess of \$45,000 [R. 555, 560-561, 610-611].

Appellant received no salary from the corporation whatsoever [R. 563]. Appellant testified, without contradiction, "I took money out sometime because I felt I could, because I put money into it, but that is all * * *" [R. 563]. Almost from its inception the corporation was operated at a loss [R. 251-252, 547, 606].

Uncontradicted testimony and record evidence demonstrated that between 1943 and 1946, appellant loaned to the corporation more than \$45,000, much of which was in part deposited into the corporation's bank accounts at the Citizens Bank and the Security-First National Bank, and a great part of which appellant paid directly out of his own pocket for the benefit of the corporation and as loans to it [R. 254-255, 306, 548-549, 552, 580-587, 594-598, 600, 606, 640, Exs. F, H, M].

This money was obtained by appellant [R. 542] in the main by gifts from his grandmother (who had supplied him with money for many years) [R. 253-254, 329-330, 337-339, 474-477, 529]; by loans from his prior wife, Phyllis Clawson, in the sum of approximately \$15,000 [R. 479-480, 555-557] and for which she received the corporation's receipts [R. 490, 533]; by loans from his then-wife, Kathleen, in the sum of approximately \$20,000 [R. 252-253, 338-339, 530, 532, 548, 565-567, 582, 672-673]; loans and remittances from his mother, in the sum of approximately \$16,000-\$17,000 [R. 513, 516-517, 254, 435-449, 474]; loans from lending institutions, including the Auto Finance Co., Markwell & Co., and Sunset &

Vine Loan Co., to himself and to his wife mainly for the benefit and use of the corporation [R. 565-566], and loans from outsiders [R. 253].

These outsiders included, among others, witness Mrs. Julia Rudd, who, it is undisputed, in 1945 lent appellant about \$11,500, and in 1946 about \$900, to be used in his business [497, 499-500, 543].

And the Superintendent of Postal Telegraph and Cable Co. at Oakland testified without contradiction that appellant's mother remitted to him many thousands of dollars each year beginning in about 1933 [435-449]. Appellant's mother had been given this money by her mother, appellant's grandmother, for transmittal to him [512, 522]. The total sums thus transmitted to appellant were between \$125,000 and \$150,000 [R. 513, 523].

In fact, appellant was later made the subject of an information on charges of violating the Corporate Securities Act, etc., in the Superior Court, County of Los Angeles as a result of his and Clawson Enterprises, Inc.'s borrowing money, and their inability to repay such loans in 1947. The case was later dismissed upon arrangements being made to repay those loans. (Superior Court, L. A. County, Case No. 130571.)

Appellant, in utilizing or disbursing corporate funds, did so on behalf of the corporation, in repayment of its debts to appellant and the others who had loaned money for its operations.

The proceeds of the sale of the restaurant were utilized as follows:

\$9,500 as a further payment on the Artemis on behalf of the corporation [R. 568-570, Exs. 8-A, 8-B].

\$3,000 redeposited into the corporation's account [R. 577, 580, 584-585, Ex. 36].

\$5,000 for furniture and for Phyllis Clawson [R. 578, Ex. 37] in partial repayment of the \$15,000 (*supra*) she advanced for the operations of the corporation [R. 578, Ex. 37].

\$3,350 to appellant [R. 580, Ex. 37] in partial repayment of the \$44,000 he had loaned to the corporation.

The proceeds of the sale of the "Artemis" were distributed as follows:

\$8,000 to Kathleen Clawson in repayment of funds advanced by her to the corporation [571-572, Ex. 30].

\$25,000 deposited to the account of the corporation [R. 573, 575, 576, Exs. 31-A, 33-A].

\$8,000 paid to Vine-Sunset Loan Co. to pay off loans made by Kathleen Clawson, Phyllis Clawson and appellant, the proceeds of which had been used in connection with the operations of the corporation [R. 573-574].

\$8,000 to Markwell & Co. in repayment of loans made by her the proceeds of which were loaned to the corporation [R. 596].

\$10,000 to Auto Finance Company to repay loan the proceeds of which were used for the corporation [R. 574-575, 596].

Appellant otherwise utilized the remaining \$7,750. But the corporation owed him more than \$44,000 (*supra*). Therefore this \$7,750 did not constitute income to appellant.

Where did appellant obtain funds for his personal living expenses? Partly from the corporation after the sale of the restaurant (*supra* and *infra*) and partly from his then wife, Katherine Clawson, who was the beneficiary of a trust estate, No. B-919, Security-First National Bank of Los Angeles, Sixth and Spring Streets, from which she received about \$80,000 while married to appellant [R. 531, 619, 672-675, 676, 679, 684-685].

The total funds taken by appellant from the corporation for his own use did not at any time even approximate the indebtedness of the corporation to him, of about \$44,000. The funds taken by appellant from the corporation to repay other persons who had advanced money for its operations, were repaid on behalf of the corporation, and, we respectfully submit, cannot be considered as income to appellant.

2. Procedure.

In its Opinion, this Court stated that all other errors specified by appellant are without merit. Petitioner respectfully requests reconsideration of this conclusion.

A. Appellant sought by motion a bill of particulars; the motion was denied [Cr. 4-8].

Had appellant been furnished a bill of particulars, he could have met various issues which were raised for the first time at the trial, including the mutually-exclusive theories of the prosecution as to the corporate income of Clawson Enterprises, Inc., constituting (1) direct income to appellant under the *alter ego* theory and (2) indirect income to appellant under the constructive dividend theory. Not until almost the very end of the trial in this case did the Government reveal its position that it was trying a constructive dividend case, rather than an *alter ego* case.

In fact, much damaging evidence which was proper under the *alter ego* theory, but not the constructive dividend theory, was admitted.

B. The testimony of Dr. George D. Whitecotton [Tr. 647-665] and the medical records [Govt. Exs. 52-54] were purely second-degree hearsay evidence not relating to appellant but to *his grandmother*.

This hearsay testimony was highly prejudicial to appellant and should not have been admitted, since it constituted an attempt to contradict indirectly his and other witnesses' testimony to the effect that he and his wife had borrowed or received extensive funds from his grandmother which were thereafter loaned by him and his wife to Clawson Enterprises, Inc., as to which he later received repayment. These repayments of loans were part of the sums credited by the Government to appellant personally as income.

Moreover, the trial judge refused to grant a continuance to permit appellant to gather evidence to rebut this surprise hearsay testimony.

C. Various instructions given by the trial court should not have been given, we submit. Others offered by appellant and rejected by the trial court were essential to his case. In both sets of instances appellant was gravely prejudiced to an extent requiring reversal of his conviction. We point to but a few instances selected from many set forth in our main brief.

(a) GOVERNMENT'S INSTRUCTION NO. 2.

"If you find that there were any gains, profits, or income received by the defendant which were not reported, *it makes no difference as far as the question of taxability is concerned whether such income was lawfully received or unlawfully received, inasmuch*

as both were taxable and should have been reported."
(Italics added.)

We respectfully submit that this is not the law (*Commissioner v. Wilcox*, 66 S. Ct. 546). Plainly the jury was misinstructed here and its verdict could have been predicated upon acceptance and application of this instruction.

(b) GOVERNMENT'S INSTRUCTION No. 9.

"Every person subject to income tax, 'except persons whose gross income (1) consists solely of salary, wages, or similar compensation for personal services rendered, or (2) arises solely from the business of growing and selling products of the soil, *shall, for the purpose of enabling the Commissioner to determine the correct amount of income subject to the tax, keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of the gross income and the deductions, credits, and other matters required to be shown*' in an income tax return."

No issue is present in this case as to failure to "keep such permanent books of account or records * * *" etc. Wilful failure to comply with this regulation can be the basis of a criminal prosecution. However, it was not the basis of the instant prosecution. The jury plainly could have been led to believe by this instruction that failure to keep sufficient books was the gravamen of the offense.

(c) GOVERNMENT'S INSTRUCTION No. 10.

"'Wilful,' in the statute which makes a wilful attempt *to evade taxes* a crime, refers to the state of mind in which the act of evasion was done. * * *"

This was not a tax evasion case under Section 145(b) of the Internal Revenue Code. The language quoted

could easily have misled the jury as to the issues before it, and may have been responsible for the conviction in this case.

(d) DEFENDANT'S INSTRUCTION No. 3.

"It is immaterial whether or not Clawson Enterprises, Inc., had any income during 1946" [C. T. 17].

(e) DEFENDANT'S INSTRUCTION No. 9.

"Nor can the receipts of a corporation be chargeable to its stockholders or sole stockholder for income tax purposes" [C. T. 17].

Clawson Enterprises, Inc., was not on trial; its *income* had no bearing on this case. The voluminous testimony as to the corporation's income, based on the *alter ego* theory subsequently disavowed by the prosecution, prejudicially confused the jury as to the issues before it, namely whether appellant *as an individual* had a gross income requiring the filing of an individual income tax return by him.

(f) DEFENDANT'S INSTRUCTION No. 12.

"You cannot find that the defendant acted wilfully if he did not understand clearly the requirements of the law as they applied to him in connection with income tax returns for 1946" [C. T. 17].

(g) DEFENDANT'S INSTRUCTION No. 13.

"You cannot find that the defendant acted wilfully if he is shown to have honestly believed that under the circumstances presented in this case he did not have to file any return for 1946, or if he relied upon the advice of an accountant or an attorney as to his rights and obligations in that regard" [C. T. 18].

These instructions were essential to clarify the wilfulness element of the case. Appellant was clearly confused as to his duties in the premises. He believed that no return was required unless he had net income—and there was no net income. The jury should have been instructed on the law relating to appellant's defense.

(h) DEFENDANT'S INSTRUCTION No. 18.

"Money misappropriated, embezzled or stolen does not constitute income, either gross or net, to the person who misappropriates, embezzles or steals the money in question" [C. T. 18].

This instruction paraphrases the Supreme Court's holding in *Commissioner v. Wilcox* (1946), 327 U. S. 404, 66 S. Ct. 546. Appellant was entitled to have the jury instructed as to all the law applicable to him under the facts which the jury may have found to exist. (See also Govt. Instr. No. 2, *supra*.)

(i) DEFENDANT'S REQUESTED INSTRUCTION No. 28.

"The doctrine of corporate entity fills a useful purpose in business life. Whether the purpose be to gain an advantage under the law of the state of incorporation or to avoid or to comply with the demands of creditors or to serve the creator's personal or undisclosed convenience, so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity" [C. T. 23-24].

(j) DEFENDANT'S REQUESTED INSTRUCTION No. 29.

"The corporate form must be unreal or a sham before the Treasury may disregard it. Whatever may have been the purpose of organizing the corporation,

so long as that purpose is the equivalent of business activity, or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity” [C. T. 24].

These rejected instructions correctly reflect those principles of law which are favorable to appellant (see cases cited above). Indeed, the instructions given did not present the law as it applied to the divergent views as to the facts before the jury.

We respectfully submit that the instructions sought by appellant should have been given, and those objected to should not have been placed before the jury.

Conclusion.

Appellant respectfully submits that this petition for rehearing should be granted, and that upon such rehearing the judgment below should be reversed.

RAYMOND W. CLAWSON,

Petitioner.

WILLIAM STRONG,

Attorney for Petitioner.

Certificate of Counsel.

I certify that in my judgment this petition is well-founded and is not interposed for delay.

WILLIAM STRONG.



United States
Court of Appeals
for the Ninth Circuit

MARY NEIL and WILLIAM P. NEIL,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California, Central Division

NOV 30 1951

United States
Court of Appeals
for the Ninth Circuit

MARY NEIL and WILLIAM P. NEIL,
Appellants,
vs.

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Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California, Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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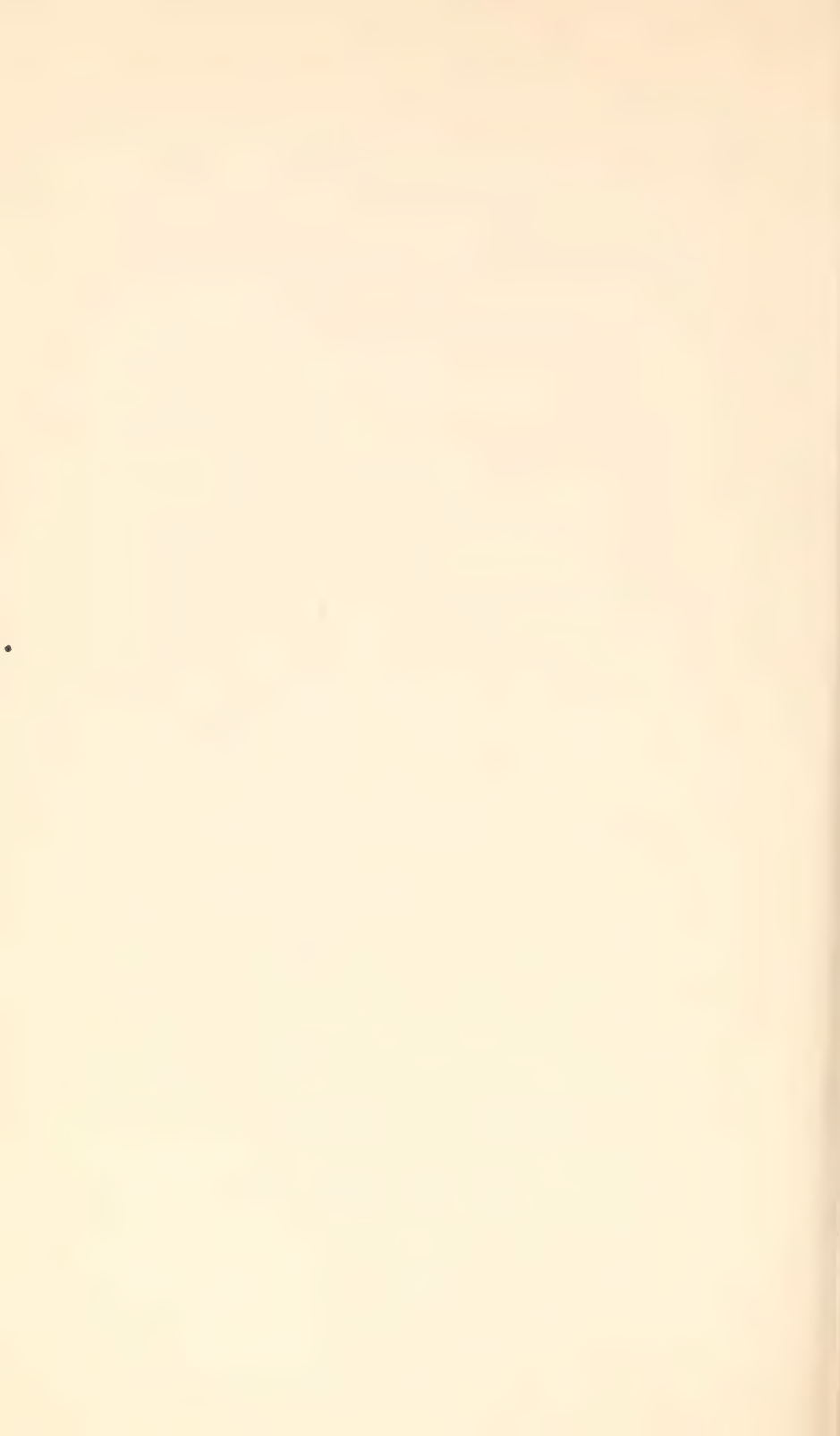
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* Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court, Southern
District of California, Central Division

No. 12041—HW

MARY NEIL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR RECOVERY OF TAXES
ILLEGALLY ASSESSED AND COLLECTED

The above named plaintiff complains of the above
named defendant and for cause of action alleges:

I.

That this is a cause of actual controversy of a
civil nature arising under a law of the United
States providing for internal revenue, to-wit: Sec-
tions 1 to 322 inclusive of the Internal Revenue
Code.

II.

That on or about the 15th day of March, 1947,
plaintiff filed her individual United States Income
Tax return on Form 1040 with Harry C. Westover,
the duly qualified and acting Collector of Internal
Revenue for the above named defendant, in the
Sixth District of California. That based upon said
Income [2] Tax return, there was assessed in-
dividual Federal Income Taxes against the plain-
tiff in the amount of \$10,974.06 for the calendar

year 1946. That on or about the 15th day of March, 1947, plaintiff paid to the said Collector of Internal Revenue the sum of \$7,935.98, being the last and final payment upon the said assessment of individual Income Taxes for the calendar year 1946 against the plaintiff.

III.

That on or about the 31st day of October, 1949, said Harry C. Westover ceased to be the Collector of Internal Revenue for the Sixth District of California and at no time since said date has he acted as such.

IV.

That thereafter, on or about the 15th day of May, 1949, the above named plaintiff filed a claim with the Collector of Internal Revenue for the Sixth District of California for a refund of a portion of individual Income Taxes assessed against her for the Calendar year 1946, upon the grounds that plaintiff's income from the Le Roy D. Owen Company, a co-partnership, had been erroneously over-stated upon plaintiff's individual Income Tax return for the year 1946 and therefore plaintiff had overpaid her Federal Income Taxes for the year 1946 in the amount of \$2,590.89, as shown upon the said refund claim. A copy of the said Claim is attached hereto and marked Exhibit "A".

V.

That no part of the said sum of \$2,590.89 has been

repaid to plaintiff and that the whole thereof is now owing.

VI.

That more than six months has elapsed since the filing of the said refund claim with the said Collector of Internal Revenue. [3]

Wherefore, plaintiff prays judgment against defendant for the sum of \$2,590.89 together with interest as provided by law from March 15, 1947, for costs of suit and general relief.

Dated: August 3, 1950.

/s/ PRESTON D. OREM,
Attorney for Plaintiff. [4]

CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- ☐ REFUND OR TAX ILLEGALLY COLLECTED.
- ☐ REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.
- ☐ ABATEMENT OF TAX ASSESSED (not applicable to estate, gift, or income taxes).

COLLECTOR'S STAMP

(Date received)

STATE OF California }
COUNTY OF Los Angeles } ss:

Name of taxpayer or purchaser of stamps Mary Neil

Business address 4814 Loma Vista Avenue, Los Angeles 11, California

(Street)

(City)

Residence 1441 South Oakland Avenue, Pasadena, California

TYPE
OR
PRINT

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named and that the facts given below are true and complete:

- District in which return (if any) was filed Sixth, California
- Period (if for income tax, make separate form for each taxable year) from Jan. 1, 1946 to Jan. 1, 1947
- Character of assessment or tax Overpayment of Income Tax
- Amount of assessment, \$ 7,935.98 Dates of payment March 15, 1947
- Date stamps were purchased from the Government Eighty Nine Cents
- Amount to be refunded Two Thousand Five Hundred Ninety Dollars & 7/10 \$ 2,590.89
- Amount to be abated (not applicable to income, gift, or estate taxes) \$
- The time within which this claim may be legally filed expires, under section 322(b) of Internal Revenue Code (Revenue Act or Internal Revenue Code) on March 15, 1950

The deponent verily believes that this claim should be allowed for the following reasons:

Amended return filed as of the date of this claim which reflects proper taxable income received from Le Roy D. Owen Company for the Year 1946, in accordance with Amended Partnership Return of the Le Roy D. Owen Company filed February 17, 1949

Tax Paid with Original Return	\$7,935.98
Correct Tax Per Amended Return	<u>5,345.09</u>

Refund	<u>\$2,590.89</u>
--------	-------------------

(Attach letter-size sheets if space is not sufficient)

Sworn to and subscribed before me this

Signed MARY NEIL

day of _____, 19__

NOTARIZATION

(Signature of officer administering oath)

(Title)

(SEE INSTRUCTIONS ON REVERSE SIDE)

File this return with Collector of Internal Revenue on or before March 15, 1948. Any balance of tax due (item 9, below) must be paid in full with return. See separate instructions for filling out return.

1946

1947

FORM 1040
Treasury Department
Internal Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN
FOR CALENDAR YEAR 1947

or fiscal year beginning 1947, and ending 1947

EMPLOYEES.—Instead of this form, you may use your Withholding Statement, Form W-2, as your return, if your total income was less than \$5,000, consisting wholly of wages shown on Withholding Statements or of such wages and not more than \$100 of other wages, dividends, and interest.

Do not write in these spaces

File
Copy
Serial
No.
Date
(Cashier's Stamp)

Name Mary Neil
(PLEASE PRINT. If this return is for a husband and wife, use both first names)

ADDRESS 1441 South Oakland Ave.
(PLEASE PRINT. Street and number or rural route)

Pasadena California
(City or town, postal zone number) (County) (State)

Occupation Social Security No.

List your own name.

If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband).

List names of other close relatives (as defined in Instruction 1) with 1947 incomes of less than \$500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

Name (please print)	Relationship	Name (please print)	Relationship
Your name Mary Neil	XXXXXXXXXX		

Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1947, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues,

insurance, bonds, etc. Members of armed forces and persons claiming traveling or reimbursed expenses, see Instruction 2.

Print Employer's Name	Where Employed (City and State)	Amount
Wm. P. Neil Co.	Los Angeles, Cal.	\$ 25,000.00
1/2 Community (Wm. P. Neil)		12,500.00

Enter total here → \$ 12,500.00

3. Enter here the total amount of your dividend Directors Fee 1/2 Community 1,525.00

4. Enter here the total amount of your interest (including interest from Government obligations unless wholly exempt from taxation)

5. If you received any other income, give details on page 2 and enter the total here. 9,728.19

6. Add amounts in items 2, 3, 4, and 5, and enter the total here. \$ 23,753.19

IF YOUR INCOME WAS LESS THAN \$5,000.—You may find your tax in the tax table on page 4. This table, which is provided by law, automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, casualty losses, medical expenses, and miscellaneous expenses. If your expenditures and losses of these classes amount to more than 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 3.

IF YOUR INCOME WAS \$5,000 OR MORE.—Disregard the tax table and compute your tax on page 3. You may either take a standard deduction of \$500 or itemize your deductions, whichever is to your advantage.

HUSBAND AND WIFE.—If husband and wife file separate returns, and one itemizes deductions, the other must also itemize deductions.

7. Enter your tax from table on page 4, or from line 12, page 3. \$ 8,383.17

8. How much have you paid on your 1947 income tax?
(A) By withholding from your wages. \$ 2,273.74
(B) By payments on 1947 Declaration of Estimated Tax. 764.34
Enter total here → 3,038.08

9. If your tax (item 7) is larger than payments (item 8), enter BALANCE OF TAX DUE here. \$ 5,345.09

10. If your payments (item 8) are larger than your tax (item 7), enter the OVERPAYMENT here. \$

Check () whether you want this overpayment: Refunded to you ☐ or Credited on your 1948 estimated tax ☐

If you filed a return for a prior year, what was the latest year? 1945

To which Collector's office was it sent? Los Angeles

To which Collector's office did you pay amount claimed in item 8 (B), above? Los Angeles

Is your wife (or husband) making a separate return for 1947? Yes

If "Yes," write below: Name of wife (or husband) Wm. P. Neil (Yes or No)

Collector's office to which sent Los Angeles

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature of person (other than taxpayer or agent) preparing return) (Date) (Signature of taxpayer) (Date)

(Name of firm or employer, if any) (If this is a joint return of husband and wife, it must be signed by both)

Do not use this page if your income is wholly from salaries, wages, dividends, and interest

Schedule A.—INCOME FROM ANNUITIES OR PENSIONS

1. Cost of annuity (total amount you paid in).....	\$.....	4. Total amount received this year.....	\$.....
2. Amount received tax-free in prior years.....		5. Excess, if any, of line 4 over line 3.....	
3. Remainder of your cost (line 1 less line 2).....	\$.....	6. Enter line 5, or 3 percent of line 1, whichever is greater.....	\$.....
		(Attach separate schedule for each additional annuity or pension)	

Schedule B.—INCOME FROM RENTS AND ROYALTIES

1. Kind of property	2. Amount of rent or royalty	3. Depreciation or depletion (explain in Schedule F)	4. Repairs (explain in Schedule G)	5. Other expenses (Itemize in Schedule G)
	\$.....	\$.....	\$.....	\$.....
Net profit (or loss) (col. 2 less sum of cols. 3, 4, and 5).....	\$.....	\$.....	\$.....	\$.....

Schedule C.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (Farmers should obtain Form 1040F)

State (1) nature of business.....; (2) business name.....

(3) business address.....

Do NOT include in this schedule cost of goods withdrawn for personal use or deductions not connected with business or profession.

1. Total receipts.....	\$.....	OTHER BUSINESS DEDUCTIONS	
COST OF GOODS SOLD		11. Salaries and wages not in line 4.....	\$.....
(To be used where inventories are an income-determining factor)		12. Interest on business indebtedness.....	
(Enter the letters "C" or "M" on lines 2 and 8 if inventories are valued at either cost, or cost or market, whichever is lower)		13. Taxes on business and business property.....	
2. Inventory at beginning of year.....	\$.....	14. Losses (explain in Schedule G).....	
3. Merchandise bought for sale.....		15. Bad debts arising from sales or services.....	
4. Labor.....		16. Depreciation, obsolescence and depletion (explain in Schedule F).....	
5. Material and supplies.....		17. Rent, repairs, and other expenses (explain in Schedule G).....	
6. Other costs.....		18. Amortization of emergency facilities (attach statement).....	
(explain in Schedule G).....		19. Net operating loss deduction (attach statement).....	
7. Total of lines 2 to 6.....	\$.....	20. Total of lines 11 to 19.....	\$.....
8. Less inventory at end of year.....		21. Total of lines 9 and 20.....	\$.....
9. Net cost of goods sold (line 7 less line 8).....	\$.....	22. Net profit (or loss) (line 1 less line 21).....	\$.....
10. Gross profit (line 1 less line 9).....	\$.....		

Schedule D.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

1. Net gain (or loss) from sale or exchange.....
2. Net gain (or loss) from sale or exchange.....

Exhibit "A" (Cont.)

State Schedule D)

Schedule E.—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

1. Name and address of partnership, syndicate, etc.....	LeRoy D. Owen Co., I. A.	Amount, \$19,456.39
2. Name and address of estate or trust.....		Amount,
3. Other sources (state nature).....		Amount,
4. Total.....	1/2 community	9,728.19
Total income from above sources (Enter as item 5, page 1).....		\$ 9,728.19

TAX COMPUTATION—FOR PERSONS NOT USING TAX TABLE ON PAGE 4

1. Enter amount shown in item 6, page 1. This is your Adjusted Gross Income.....	\$23,753.19
2. Enter DEDUCTIONS (if deductions are itemized above, enter the total of such deductions; if adjusted gross income (line 1, above) is \$5,000 or more and deductions are not itemized, enter the standard deduction of \$500).....	500.00
3. Subtract line 2 from line 1. Enter the difference here. This is your Net Income.....	\$23,253.19
4. Enter your exemptions (\$500 for each person whose name is listed in item 1, page 1).....	500.00
5. Subtract line 4 from line 3. Enter the difference here.....	\$22,753.19
6. Use the tax rates in instruction sheet to figure your combined tentative normal tax and surtax on amount entered on line 5. Enter the tentative tax here. (If line 3, above, includes partially tax-exempt interest, see Tax Computation Instructions).....	\$ 8,824.39
7. Enter here 5 percent of amount entered on line 6, above.....	441.22
8. Subtract line 7 from line 6. Enter the difference here. This is your combined normal tax and surtax. (If alternative tax computation is made on separate Schedule D, enter here tax from line 12 of Schedule D).....	\$ 8,383.17

IF YOU USED THE \$500 STANDARD DEDUCTION IN LINE 2, DISREGARD LINES 9, 10, AND 11, AND COPY ON LINE 12 THE SAME FIGURE YOU ENTERED ON LINE 8.

9. Enter here any income tax payments to a foreign country or U. S. possession (attach Form 1116).....	\$.....
10. Enter here any income tax paid at source on tax-free covenant bond interest.....	
11. Add the figures on lines 9 and 10 and enter the total here.....	
12. Subtract line 11 from line 8. Enter the difference here and in item 7, page 1. This is your tax.....	\$ 8,383.17

Endorsed: Filed Aug. 4, 1950

[Title of District Court and Cause No. 12,041.]

ANSWER

Comes now the defendant in the above-entitled action and, in answer to plaintiff's complaint herein, admits, denies and alleges:

I.

Denies the allegations contained in paragraph I thereof.

II.

Admits the allegations contained in paragraph II thereof, except that defendant denies that there was assessed individual federal income taxes against the plaintiff in the amount of \$10,974.06.

III.

Admits the allegations contained in paragraph III thereof.

IV.

Denies the allegations contained in paragraph IV thereof, except that defendant admits that on or about the 15th day of May, 1949, the plaintiff filed a claim for refund of a portion of the individual income taxes assessed against [10] her for the calendar year 1946. Defendant denies the allegations contained in said refund claim, Exhibit A attached to her complaint.

V.

Denies the allegations contained in paragraph V

thereof, except that defendant admits that no part of said sum claimed has been repaid.

VI.

Admits the allegations contained in paragraph VI thereof.

Wherefore, having fully answered, defendant prays that it be hence dismissed with its costs in this behalf expended.

ERNEST A. TOLIN,
United States Attorney,
E. H. MITCHELL and
EDWARD R. McHALE,
Assistant U. S. Attorneys,
EUGENE HARPOLE and
FRANK W. MAHONEY,
Special Attorneys,
Bureau of Internal Revenue.

/s/ E. H. MITCHELL,
Attorneys for Defendant. [11]

Affidavit of Service by Mail attached. [12]

[Endorsed]: Filed Nov. 9, 1950.

In the United States District Court, Southern
District of California, Central Division

No. 12042—Y

WILLIAM P. NEIL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR RECOVERY OF TAXES
ILLEGALLY ASSESSED AND COLLECTED

The above named plaintiff complains of the above
named defendant and for cause of action alleges:

I.

That this is a cause of actual controversy of a
civil nature arising under a law of the United
States providing for internal revenue, to-wit: Sec-
tions 1 to 322 inclusive of the Internal Revenue
Code.

II.

That on or about the 15th day of March, 1947,
plaintiff filed his individual United States Income
Tax return on Form 1040 with Harry C. Westover,
the duly qualified and acting Collector of Internal
Revenue for the above named defendant, in the
Sixth District of California. That based upon said
Income [13] Tax return, there was assessed in-

dividual Federal Income Taxes against the plaintiff in the amount of \$10,974.06 for the calendar year 1946. That on or about the 15th day of March, 1947, plaintiff paid to the said Collector of Internal Revenue the sum of \$7,935.98, being the last and final payment upon the said assessment of individual Income Taxes for the calendar year 1946 against the plaintiff.

III.

That on or about the 31st day of October, 1949, said Harry C. Westover ceased to be the Collector of Internal Revenue for the Sixth District of California and at no time since said date has he acted as such.

IV.

That thereafter, on or about the 15th day of May, 1949, the above named plaintiff filed a claim with the Collector of Internal Revenue for the Sixth District of California for a refund of a portion of individual Income Taxes assessed against him for the calendar year 1946, upon the grounds that plaintiff's income from the LeRoy D. Owen Company, a co-partnership, had been erroneously over-stated upon plaintiff's individual Income Tax return for the year 1946 and therefore plaintiff had overpaid his Federal Income Taxes for the year 1946 in the amount of \$2,590.89, as shown upon the said refund claim. A copy of the said Claim is attached hereto and marked Exhibit "A".

V.

That no part of the said sum of \$2,590.89 has been repaid to plaintiff and that the whole thereof is now owing.

VI.

That more than six months has elapsed since the filing of the said refund claim with the said Collector of Internal Revenue. [14]

Wherefore, plaintiff prays judgment against defendant for the sum of \$2,590.89 together with interest as provided by law from March 15, 1947, for costs of suit and general relief.

Dated: August 3, 1950.

/s/ PRESTON D. OREM,
Attorney for Plaintiff. [15]

[Printer's Note: Exhibit "A" is identical to Exhibit "A" photostated at pages 6-8 of this printed Record, except for name William P. Neil appearing in place of Mary Neil.]

[Endorsed]: Filed Aug. 4, 1950.

[Title of District Court and Cause No. 12,042.]

ANSWER

Comes now the defendant in the above-entitled action and, in answer to plaintiff's complaint herein, admits, denies and alleges:

I.

Denies the allegations contained in paragraph I thereof.

II.

Admits the allegations contained in paragraph II thereof, except that defendant denies that there was assessed individual federal income taxes against the plaintiff in the amount of \$10,974.06.

III.

Admits the allegations contained in paragraph III thereof.

IV.

Denies the allegations contained in paragraph IV thereof, except that defendant admits that on or about the 15th day of May, 1949, the plaintiff filed a claim for refund of a portion of the individual income taxes assessed against [21] him for the calendar year 1946. Defendant denies the allegations contained in said refund claim, Exhibit A attached to his complaint.

V.

Denies the allegations contained in paragraph V thereof, except that defendant admits that no part of said sum claimed has been repaid.

VI.

Admits the allegations contained in paragraph VI thereof.

Wherefore, having fully answered, defendant prays that it be hence dismissed with its costs in this behalf expended.

ERNEST A. TOLIN,
United States Attorney,
E. H. MITCHELL and
EDWARD R. McHALE,
Assistant U. S. Attorneys,
EUGENE HARPOLE and
FRANK W. MAHONEY,
Special Attorneys,
Bureau of Internal Revenue.

/s/ E. H. MITCHELL,
Attorney for Defendant. [22]

Affidavit of Service by Mail attached. [23]

[Endorsed]: Filed Nov. 9, 1950.

At a stated term, to-wit: The September Term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 8th day of January in the year of our Lord one thousand nine hundred and fifty-one.

Present:

The Hon. Harry C. Westover, District Judge.

[Title of Causes Nos. 12,041-12,042.]

MINUTE ORDER

For setting; Preston D. Orem, Esq., appearing as counsel for plaintiffs; E. H. Mitchell, Ass't U. S. Att'y, appearing as counsel for Gov't;

Court orders these causes consolidated for trial and sets trial for April 2, 1951, 10 a.m. [24]

At a stated term, to wit: The February Term, A.D. 1951, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 2nd day of April in the year of our Lord one thousand nine hundred and fifty-one.

Present:

The Hon. Harry C. Westover, District Judge.

[Title of Causes Nos. 12,041-12,042.]

MINUTE ORDER

For consolidated trial; P. D. Orem, Esq., appearing as counsel for plaintiff; Frank W. Mahoney, Ass't U. S. Att'y, appearing as counsel of Gov't; stipulation of facts is presented and filed.

Counsel state no objection to the Court's hearing the matter.

Court orders cause continued to April 3, 1951, 10 a.m., for trial. [25]

[Title of District Court and Causes 12,041-12,042.]

STIPULATION OF FACTS

It Is Hereby Stipulated by and between the parties hereto that the following facts shall be taken as true, provided, however, that this stipulation does not waive the rights of either party to introduce other evidence not at variance with the facts herein stipulated, or to object to the introduction in evidence of any such facts on the grounds of immateriality or irrelevancy.

I.

That these are causes of actual controversy arising under laws of the United States providing for internal revenue.

II.

That at all times since January 1, 1943, both of the plaintiffs have been, and now are individuals residing, and having their principal place of business, within the County of Los Angeles, State of California.

III.

That at all times since January 1, 1943, plaintiff Mary Neil has been, and now is, the wife of plaintiff William P. Neil.

IV.

That all taxable income of William P. Neil and Mary Neil for the calendar year 1946 was, and is, community income under the laws of the State of California.

V.

That at all times from July 1, 1943, to October 31, 1949, Harry C. Westover was the Collector of Internal Revenue for the Sixth District of California.

VI.

That plaintiffs filed their separate original individual income tax returns for the calendar year 1946 on March 15, 1947, in the Sixth District of California. That a certified copy of the said return of plaintiff Mary Neil is attached hereto, marked Exhibit 1, and showing a total income tax liability of \$10,974.06, of which \$3,038.08 was paid by withholding from wages and on Declaration of Estimated Tax, and the balance of \$7,935.98 paid on March 15, 1947. That a certified copy of the said return of plaintiff William P. Neil is attached hereto, marked Exhibit 2, and showing the same total income tax and deductions for taxes paid, and payment of the balance of income taxes on March 15, 1947, of \$7,935.98. That upon Exhibits 1 and 2, respectively, each of the plaintiffs reported in Schedule E thereof, \$14,284.10, and \$14,284.11, as income for the partnership of "Le Roy D. Owen Co."; the total reported upon both returns being \$28,568.21.

VII.

That plaintiff William P. Neil and Le Roy D. Owen were at all times during the period from December 1, 1943, to September 30, 1946, partners in a real estate brokerage business under the name of "Le Roy D. Owen Company"; that the original

Articles of Limited Partnership, and a copy of the assignment of partnership interest, are attached hereto as Exhibit 3. That at all times during the life of the said partnership, Le Roy D. Owen was the only general partner, and William P. Neil was the only limited partner. That at all times during the life of the partnership, the books and assets were kept at the principal place of business, 621 South Hope Street, Los Angeles, California, and were in the custody of the general partner.

VIII.

That at no time was the said partnership licensed to do a real estate brokerage business by the Division of Real Estate of California; that at all times during the period from December 3, 1943, to September 30, 1946, Le Roy D. Owen, held a real estate broker license, doing business as "Le Roy D. Owen Co."; and transacted the real estate brokerage business of the said partnership under such individual license.

IX.

That the original partnership capital consisted wholly of \$5,000 in cash contributed by William P. Neil during the month of December 1943, in accordance with Article VI of the certificate of Limited Partnership (Exhibit 3). That during the calendar year 1944, William P. Neil advanced or contributed the additional sum of \$3,000 to the partnership which sum was returned to him by the partnership prior to September 30, 1946. That the original in-

vestment of \$5000 was returned by the partnership to William P. Neil prior to September 30, 1946, together with \$1007 representing interest at the rate of 5% per annum upon the \$8000 contributed by William P. Neil.

X.

That the partnership income tax returns for the calendar years 1943, 1944 and 1945 filed by the partnership in the Sixth District of California reported net taxable distributive income and losses of William P. Neil as follows:

Year	Amount
1943 Loss	\$ 303.35
1944 Income	1,809.14
1945 Income	6,909.28

Total Net Income....\$8,415.07

That the books of the partnership for the years 1943, 1944 and 1945 reflect net taxable distributive income and losses of William P. Neil of the same amounts as shown by the said partnership returns for the years 1943, 1944 and 1945.

XI.

That a partnership income tax return for the calendar year 1946 was filed in the Sixth District of California on February 18, 1949, by William P. Neil, a certified copy of which is attached hereto is Exhibit 4. The books of the partnership show a net income of the partnership for the year 1946 to be the sum of \$63,719.67.

XII.

That other than the returns of capital investments of \$8000 set forth in paragraph IX herein, the only distribution by the partnership to William P. Neil during the period from December 1, 1943, to September 30, 1946, was \$1,007.00 as interest on capital investment which William P. Neil received on September 11, 1946, as set forth in said paragraph IX.

XIII.

That after the dissolution of the said partnership on September 30, 1946, William P. Neil received the following distributions from the partnership on or about November 21, 1946, said distributions being made by Le Roy D. Owen:

Cash—\$3,505.87

Corporation stocks:

75 shares of Dorrington, Inc.

100 shares of The Black & Decker Manufacturing Company

50 shares of Bullocks, Inc.

100 shares of International Detrola Corporation (name now changed to Newport Steel Company)

200 shares of Sun Chemical Corporation

100 shares of Tidewater Associated Oil Company.

XIV.

That the foregoing distributed corporation stocks

were purchased for cash by the partnership and carried upon the books at cost, as follows:

	Date of Purchase	Cost
Dorrington, Inc.—75 shares.....	August 14, 1946	\$7,500.00
The Black & Decker Manufacturing Company—100 shares.....	May 31, 1946	4,473.93
Bullocks, Inc.—50 shares.....	May 27, 1946	2,687.50
International Detrola Corporation— 100 shares	May 24, 1946	1,917.55
Sun Chemical Corporation—200 shares....	July 3, 1946	4,423.77
Tidewater Associated Oil Co.— 100 shares.....	July 3, 1946	2,355.84
Total Cost		<hr/> \$23,358.59

XV.

That on March 7, 1947, William P. Neil filed an action No. 526479, for money due on contract, against Le Roy D. Owen in the Superior Court of the State of California in and for the County of Los Angeles; that on February 7, 1949, judgment was entered in favor of the defendant; Allen W. Ashburn, Judge, ruling that the third amended complaint failed to state a cause of action; that plaintiff filed an appeal in the District Court of Appeal of the State of California, Second Appellate District; that on October 4, 1949, the parties moved to dismiss the appeal after payment of \$1000 by defendant Le Roy D. Owen to plaintiff William P. Neil; that a certified copy of the Clerk's Transcript on appeal is attached hereto as Exhibit 5, and a copy of the Reporter's transcript on Appeal is attached hereto as Exhibit 6.

XVI.

That attached hereto as Exhibit 7 is a certified copy of a claim for refund filed on May 15, 1949, by Mary Neil in the Sixth District of California; that attached hereto as Exhibit 8 is a certified copy of a claim for refund filed on May 13, 1949, by William P. Neil in the Sixth District of California. That said refund claims are those referred to in Paragraph IV of the respective complaints of plaintiffs in these actions.

XVII.

That attached hereto as Exhibit 1 is a certified copy of an amended individual income tax return of Mary Neil for the calendar year 1946; that attached hereto as Exhibit 2 is a certified copy of an amended individual income tax return of William P. Neil for the calendar year 1946.

Schedule of Exhibits

1. Certified copy of original and amended individual income tax return of *Mary* Neil for calendar year 1946.

2. Certified copy of original and amended individual income tax return of William P. Neil for calendar year 1946.

3. Articles of Limited Partnership and Assignment of Partnership Interest.

4. Certified copy of partnership income tax return for the calendar year 1946.

5. Certified copy of Clerk's Transcript on Ap-

peal in Action No. 526,479—Neil vs. Owen—Superior Court of Los Angeles County.

6. Copy of Reporter's transcript on appeal in Action No. 526,479.

7. Certified copy of claim for refund of income taxes of Mary Neil, year 1946.

8. Certified copy of claim for refund of income taxes of William P. Neil, year 1946.

Dated: April 2, 1951.

/s/ PRESTON D. OREM,
Attorney for Plaintiff.

ERNEST A. TOLIN,
United States Attorney,
E. H. MITCHELL and
EDWARD R. McHALE,
Assistant U. S. Attorneys,
EUGENE HARPOLE and
FRANK W. MAHONEY,
Special Attorneys,
Bureau of Internal Revenue,
By EUGENE HARPOLE.

[Endorsed]: Filed April 2, 1951.

[Title of District Court and Causes 12,041-12,042.]

OPINION

Plaintiff William P. Neil and LeRoy D. Owen were partners in a real estate brokerage business, doing business under the name of "LeRoy D. Owen Company." Le Roy D. Owen was the only general partner and William P. Neil the only limited part-

ner. The partnership was not licensed by the Division of Real Estate of the State of California to do a real estate [26] brokerage business; but LeRoy D. Owen held a real estate broker's license, doing business as LeRoy D. Owen Company.

A partnership income tax return was filed for the year 1946, which disclosed the income of the partnership for such year as \$63,719.67. The partnership was dissolved on September 30, 1946, and William P. Neil received certain assets of the copartnership upon its dissolution. Using the basis of the partnership net income for the year 1946 of \$63,719.67, William P. Neil and his wife filed individual income tax returns, reporting income from the partnership as \$14,284.11 each.

Subsequent to the dissolution of partnership LeRoy D. Owen failed and refused to pay or turn over to William P. Neil some of the assets of the copartnership which were to have been delivered to him upon its dissolution. On March 7, 1947, William P. Neil filed an action in the Superior Court of the State of California, in and for the County of Los Angeles, against LeRoy D. Owen for money due on the dissolution contract, and on September 7, 1949, judgment was entered in favor of the defendant, inasmuch as it appeared plaintiff in the action was not a real estate broker licensed by the State of California and approximately 95% of the income of "LeRoy D. Owen Company," a copartnership, during the year 1946 was from commissions on real estate sales. The Judgment in the Superior Court has become final.

After rendition of Judgment, plaintiffs herein filed amended income tax returns for the year 1946, reducing the amount of income from the partnership to the amount actually received. A claim for refund (Form 843) was filed by taxpayers with the Internal Revenue Department, based on the amended income tax filings. Before the Commissioner of Internal Revenue acted upon the claims (and after expiration of [27] six months) the complaints were filed herein.

Plaintiff William P. Neil contends that inasmuch as he did not actually receive the money reported as having come to him from the partnership, he and his wife should not be required to pay tax thereon.

The government contends the tax is due, inasmuch as the income was earned income.

“Income taxes must be paid on earned income.” (U.S.A vs. Ellis R. Lewis, Supreme Court No. 347, October Term, 1950.)

Plaintiffs in their brief cite to the Court the various provisions of the Business & Professions Code of California relative to the inability of one who is not a duly licensed real estate agent or broker to collect commissions or fees earned when he does not have such license.

Section 10136 of the Business & Professions Code of the State of California provides that:

“* * * no person engaged in the business or acting in the capacity of a real estate broker or real estate salesman within this State shall

bring or maintain any action in the courts of this state for the collection of compensation for the performance of any of the acts mentioned in this article without alleging and proving that he was a duly licensed real estate broker or real estate salesman at the time the alleged cause of action arose.” (Emphasis supplied.)

It will be noted the section does not say such compensation was not “earned” income. It says only that no action shall be maintained for collection thereof. [28]

The Business & Professions Code does not anywhere declare fees or compensation of an unlicensed broker or salesman are not income but states only that the courts shall not be used for collection of such fees or compensation; or that it shall be unlawful to divide a real estate agent's or broker's commission with a non-licensed person.

The Superior Court refused to allow plaintiff William P. Neil to maintain the action filed to collect money alleged to be due, on the ground that plaintiff could not allege and prove he was a duly licensed real estate broker at the time the alleged cause of action arose.

Although we feel that the equities are with the plaintiffs in this action and they should not be called upon to pay tax on income which they did not actually receive or benefit from, nevertheless the law is well established that although income is not actually received, taxpayers are required to pay tax

if the income is earned income. There is no question here but that the income was actually earned.

Judgment will be rendered in favor of defendant; defendant to prepare Findings of Fact, Conclusions of Law and Judgment in conformity herewith.

Dated this 17th day of May, 1951.

/s/ HARRY C. WESTOVER,

District Judge.

[29]

[Endorsed] Filed May 17, 1951.

[Title of District Court and Causes 12,041-12,042.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The within causes came on regularly to be heard on April 3, 1951, before the Honorable Harry C. Westover, District Judge, sitting without a jury. The plaintiffs were represented by their attorney, Preston D. Orem, and defendant was represented by its attorneys, Ernest A. Tolin, United States Attorney for the Southern District of California; E. H. Mitchell and Edward R. McHale, Assistant United States Attorneys for said District; Eugene Harpole and Frank W. Mahoney, Special Attorneys for the Bureau of Internal Revenue. The matter having been submitted on a written Stipulation of Facts and oral testimony and oral and written argument, and the Court being duly advised and hav-

ing heretofore filed herein its written [30] Opinion now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I.

That plaintiff William P. Neil and LeRoy D. Owen were at all times during the period from December 1, 1943 to September 30, 1946, partners in a real estate brokerage business under the name of Le Roy D. Owen Co. Le Roy D. Owen was the only general partner and William P. Neil was the only limited partner.

II.

That at no time was the said partnership licensed to do a real estate brokerage business by the Division of Real Estate of California; that at all times during the period from December 3, 1943, to September 30, 1946, Le Roy D. Owen, held a real estate broker license, doing business as "Le Roy D. Owen Co."; and transacted the real estate brokerage business of the said partnership under such individual license.

III.

That the original partnership capital consisted wholly of \$5,000 in cash contributed by William P. Neil. That during the calendar year 1944 William P. Neil advanced the additional sum of \$3,000 to the partnership, which sum was returned prior to September 30, 1946. The original investment of \$5,000 together with \$1,007 representing interest on said sum was returned prior to September 30, 1946.

IV.

That the partnership was dissolved on September 30, 1946, by virtue of an oral agreement of the partners.

V.

That the net income for the partnership for the period January 1, 1946 to September 30, 1946 was the sum of \$63,719.67. That pursuant to the articles of partnership \$28,568.21 of said income was distributable to William P. Neil.

VI.

That \$14,284.10 of said income was reported by each of the plaintiffs [31] herein in their original individual income tax returns for the calendar year 1946.

VII.

That on March 3, 1947, William P. Neil filed an action in the Superior Court of the State of California for the County of Los Angeles against Le Roy D. Owen for the recovery of certain assets of the partnership due to Neil by virtue of the dissolution agreement.

VIII.

That in February, 1949, the Superior Court action terminated in a Judgment for partner Owen.

IX.

That thereafter on May 13, 1949, plaintiffs filed a claim for refund alleging the distributive share of the partnership income of William P. Neil to be \$19,456.39.

X.

That all taxable income of William P. Neil and Mary Neil for the calendar year 1946 was, and is, community income under the laws of the State of California.

CONCLUSIONS OF LAW

I.

That the income of the plaintiffs from the partnership was correctly reported in the original individual income tax return filed by them on March 15, 1947.

II.

That the earned income of the partnership for the year 1946 was \$63,719.67 and that the distributive share of said earned income of William P. Neil was \$28,568.21 of which each of the plaintiffs herein properly reported the sum of \$14,284.10 and \$14,283.11 respectively as taxable income under the provisions of Sections 180 to 183 of the Internal Revenue Code.

III.

That the refusal of the Superior Court of the State of California to enforce the dissolution agreement of the parties had no effect upon their [32] federal tax liability.

IV.

That the income taxes for the calendar year 1946 were properly collected from William P. Neil and Mary Neil.

It Is Therefore Ordered and Decreed:

1. That plaintiffs take nothing by their complaint.

2. That defendant have judgment against Plaintiff and costs of suit incurred.

Dated: This 7th day of June, 1951.

/s/ HARRY C. WESTOVER,
United States District Judge. [33]

Affidavit of Service by Mail attached. [34]

[Endorsed]: Filed June 7, 1951.

In the United States District Court, Southern
District of California, Central Division

No. 12,041—HW

MARY NEIL, Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

WILLIAM P. NEIL, Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

The within causes came on regularly to be heard in the above entitled Court on April 3, 1951, the Honorable Harry C. Westover presiding without a jury. The plaintiffs were represented by their attorney Preston D. Orem, and defendant represented

by its attorneys Ernest A. Tolin, United States Attorney for the Southern District of California; E. H. Mitchell and Edward R. McHale, Assistant United States Attorneys for said District; Eugene Harpole and Frank W. Mahoney, Special Attorneys for the Bureau of Internal Revenue; and the Court having considered all the facts and evidence presented and having heard the argument of counsel and having heretofore caused its written Opinion and Findings of Fact and Conclusions of Law to be filed, now renders its Judgment: [35]

It Is Therefore Ordered, Adjudged and Decreed:

That plaintiffs recover nothing by their complaints; and that defendant recover judgment from the plaintiffs for its costs of suit incurred to be fixed by the clerk of this Court in the sum of \$20.00 in each case.

Dated: This 7th day of June, 1951.

/s/ HARRY C. WESTOVER,
United States District Judge.

Judgment entered June 7, 1951. [36]

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 7, 1951.

[Title of District Court and Causes 12,041-12,042.]

NOTICE OF MOTION TO VACATE
JUDGMENT

To Defendant herein and to Ernest A. Tolin, E. H. Mitchell, Edward R. McHale, Eugene Harpole and Frank W. Mahoney, attorneys for Defendant:

You will please take notice that on Monday, the 25th day of June, 1951, at the hour of 10:00 a.m., in the courtroom of Judge Harry C. Westover, District Judge of the above-entitled court, defendant will move the court to vacate and set aside the judgment heretofore made and entered against the plaintiffs.

Said motion will be made upon the ground that Judge Harry C. Westover, who presided at the trial of this action, was disqualified [38] to try the action or to render a judgment therein under the provisions of Section 455 of Title 28 of the Federal Judicial Code.

Dated this 12th day of June, 1951.

/s/ PRESTON D. OREM,
Attorney for Defendant. [39]

Points and Authorities

Title 28, Section 455, Federal Judicial Code. "Interest of justice or judge. Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been

of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein" (June 25, 1948, C. 646, No. 1, 62 Stat. 908).

Even although the parties to the action attempt to waive the disqualification, there can be no waiver if the disqualification is based on absolute prohibition in a statute against a disqualified judge sitting in the case. 48 C.J.S. 1101. The foregoing section 455 contains both a mandatory disqualification, and a discretionary disqualification.

Where a district judge had been counsel for a party in the case pending before him, his disqualification was not a matter for the exercise of his own discretion but was unconditional and absolute. *U. S. vs. Vasilick* (CCA 3) 160 Fed. (2d) 631, reversing 68 F. Supp. 725. In this case, the district judge had been district attorney at the time of the trial and conviction of the defendant. A district attorney is "of counsel" in all cases in his district. As a judge, he could not act upon a motion to vacate judgment, the order denying the motion was vacated and the case remanded for consideration by another district judge.

Where a judge was related to a party to the action within the fourth degree of consanguinity, the consent of all [40] parties to the action did not remove the disability, and he was disqualified to act.

In re Eatonton Electric Co. (D.C.Ga.) 120 Fed. 1010.

The Commissioner shall certify a list of such assessments when made to the proper collectors, respectively, who shall proceed to collect and account for the taxes and penalties so certified. (Section 3641, Internal Revenue Code.)

“That at all times from July 1, 1943, to October 31, 1949, Harry C. Westover was the Collector of Internal Revenue for the Sixth District of California.” (Stipulation of Facts—Paragraph V, on page 2). Thus, the judge in this case was charged with the duty of collecting the very income tax assessments for the year 1946, upon the alleged overpayment of which, plaintiffs have based these actions.

Therefore, Judge Harry C. Westover, as said Collector of Internal Revenue, had a “substantial interest” in the collection of the income taxes to which this case relates, and was also an employee and agent of defendant in the collection of the said taxes. As such, he could be said to have been “of counsel” for the defendant in this issue. Under Section 455, previously cited, the mandatory disqualification of the said trial judge is apparent. [41]

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 14, 1951.

[Title of District Court and Causes 12,041-12,042.]

NOTICE OF MOTION FOR NEW TRIAL

To Defendant herein and to Ernest A. Tolin, E. H. Mitchell, Edward R. McHale, Eugene Harpole and Frank W. Mahoney, attorneys for defendant:

You will please take notice that on Monday, the 25th day of June, 1951, at the hour of 10:00 a.m., in the courtroom of Judge Harry C. Westover, District Judge of the above-entitled court, defendant will move the court for a new trial in the above-entitled cause for the following reasons:

1. The proceedings were irregular in that the trial judge was disqualified to act as such under the provisions of [43] section 455 of Title 28 of the Federal Judicial Code, as fully set forth in the "Notice of Motion to Vacate Judgment" filed concurrently herewith.

2. The evidence was insufficient to justify the decision in that:

- (a) The court appears to have based its decision upon the fact that the partnership income in question was "earned" by plaintiff William P. Neil (Opinion, line 8 on page 3; line 17, on page 4). There is no evidence whatsoever in support of the premise that William P. Neil, as a limited partner supplying capital only, "earned" any portion whatever of the partnership income during the calendar year 1946, or at any time during the existence of the said partnership.

3. The opinion of the court is contrary to law in that:

(a) The court states that "the equities are with the plaintiffs in this action". Therefore, the decision should also favor the plaintiffs. "The law respects form less than substance". 19 AM. Jur. 317.

(b) The decision appears to be based upon a misconception of the decision in the case of *United States vs. Lewis*, 71 S. Ct. 522 (March 26, 1951). In the *Lewis* case, *Lewis* did receive income "under a claim of right" although in a later year, he was required to refund the income in question to his employer. In this case, *Neil* did not receive the partnership income "under a claim of right", but his partner *Owen* retained the said income "under a claim of right". At no point in the *Lewis* decision does the Supreme Court even mention the word "earned" or the phrase "earned income".

(c) The decision mentions Section 10136 of the Business & Professions Code of the State of California relating to actions for commissions by unlicensed real estate [44] brokers, but omits to mention the succeeding Section 10137 which states, in part, "It shall be unlawful for any licensed real estate broker to employ or compensate, directly or indirectly, any person for performing any of the acts within the scope of this chapter who is not a licensed real estate broker, or a real estate salesman licensed under the broker employing or compensating him". Section 10137 clearly ascribes to *Le Roy D. Owens*, as earned income, those real estate commissions constituting 95% of the partnership in-

come in that it prohibits directly the sharing of such commissions by Owen with an unlicensed person (Neil).

Dated this 12th day of June, 1951.

/s/ PRESTON D. OREM,

Attorney for Plaintiffs. [45]

Affidavit of Service by Mail attached. [46]

[Endorsed]: Filed June 14, 1951.

[Title of District Court and Causes 12,041-12,042.]

**NOTICE OF MOTION TO AMEND FINDINGS
OF FACT AND CONCLUSIONS OF LAW**

To Defendant herein and to Ernest A. Tolin, E. H. Mitchell, Edward R. McHale, Eugene Harpole and Frank W. Mahoney, attorneys for defendant:

You will please take notice that on Monday, the 25th day of June, 1951, at the hour of 10:00 a.m., in the courtroom of Judge Harry C. Westover, District Judge of the above-entitled court, defendant will move the court for an order amending its findings of fact and conclusions of law in the following respects:

1. By striking from paragraph V of the findings of fact at line 29, page 2, the word "\$28,568.21" and inserting [47] the word "\$19,456.39", and by striking from the same said paragraph and line, the word "distributable" and inserting the word "distributed". The foregoing proposed changes are

based upon the grounds that under the laws of the State of California relating to real estate brokerage partnerships, the partnership income was "distributive" only to Le Roy D. Owen. However, Le Roy D. Owen did "distribute" to plaintiff the sum of \$19,456.39. Reference is made at this point to the argument and authorities appearing in plaintiff's opening brief, from line 14, page 7, to line 17, page 11, inclusive. Also, further, to the argument and authorities appearing in plaintiff's reply brief, from line 13, page 2, to line 15, page 4, inclusive.

2. By inserting in the Findings of Fact at the beginning thereof, line 3, page 2, paragraphs I, II, III, V and VI of the "Stipulation of Facts" filed herein by the parties hereto. Such insertion should be made upon the grounds that the present Findings of Fact are deficient and incomplete in that it cannot be ascertained therefrom the following stipulated facts:

(a) That the controversy arises under laws of the United States providing for internal revenue (see Stipulation of Facts, I).

(b) That plaintiffs resided within the Sixth District of California (Stipulation of Facts, II).

(c) That plaintiffs were, and are, husband and wife (Stipulation of Facts, III).

(d) That at all times during the calendar year 1946, Harry C. Westover was the Collector of Internal Revenue for the Sixth District of California (Stipulation of Facts, V).

(e) That plaintiffs filed their individual income tax returns for the year 1946 in the Sixth District

of California (Stipulation of Facts, VI). [48]

3. By adding to Paragraph I of the findings of fact, the following statements: "That at all times during the life of the partnership, the books and assets were in the custody of the general partner, Le Roy D. Owen" (See paragraph VII of the "Stipulation of Facts"). "That at all times during the life of the partnership, all securities owned by the partnership were held in the name of 'Le Roy D. Owens' as evidenced by the corporation stock certificates therefor" (see opening brief for plaintiffs, lines 9 to 13, page 6). That the basis for said proposed additions is that the foregoing statements are extremely material to the decision of the principal issues herein, and their omission causes the Findings of Fact to be misleading, incomplete and supportive of erroneous conclusions of law.

4. By inserting in the Findings of Fact, Paragraph X of the "Stipulation of Facts" upon the grounds that such paragraph is an essential factual statement necessary for the computation of partnership net income distributed to plaintiffs during the calendar year 1946.

5. By adding an additional paragraph as follows: "That a partnership income tax return for the calendar year 1946 was filed in the Sixth District of California, on February 18, 1949 (see Stipulation of Facts, paragraph XI). "That such partnership income tax return reported net income distributive to partners as follows: Le Roy D. Owen, \$44,263.28; William P. Neil, \$19,456.39; total, \$63,719.67." (Exhibit 4). That the inclusion of the foregoing paragraph is essential to show that a partner-

ship income tax return was filed for the year 1946, and the distribution of the partnership income thereon.

6. By inserting in the Findings of Fact at the end thereof, paragraphs XII, XIII, XIV and XV of the "Stipulation of Facts". Such insertion should be made upon the grounds that [49] the present Findings of Fact are deficient and incomplete in that it cannot be ascertained therefrom the following material stipulated facts:

(a) The distributions of partnership assets by Le Roy D. Owen to William P. Neil during the calendar year 1946 (Stipulation of Facts, XII and XIII).

(b) The cost basis to the partnership of the securities so distributed (Stipulation of Facts, XIV).

(c) The material facts concerning the action by William P. Neil against Le Roy D. Owen in the state courts of California (Stipulation of Facts, XV).

7. By inserting in the Findings of Fact as an addition to the present paragraph II thereof the following: "That William P. Neil at no time during the existence of the partnership held a real estate brokerage license" (Opinion, lines 21 and 22, page 2; Exhibit 5). The inclusion of this sentence is requested upon the grounds that it is essential and material to properly complete the facts now stated in paragraph II of the Findings of Fact.

8. By inserting in the Findings of Fact as an addition to the present paragraph V thereof after the word "63,719.67" on line 28, page 2, the following: Approximately 95% of the said income of the

said partnership was from commissions on real estate sales.” (Opinion, lines 22 to 24, page 2). “The laws of the State of California specifically prohibited the payment of any part of income of the partnership from commissions on real estate sales to William P. Neil” (Section 10137, Business and Professional Code of the State of California). The inclusion of the foregoing is material and essential to properly complete the facts now stated in paragraph V of the Findings of Fact.

9. By striking the entire Findings of Fact upon the grounds there was evidence before the court from which it was [50] required to make findings which would countervail its other findings. 64 C.J. 1232; *Chambers vs. Farnham*, 179 p. 4, 23, 39 Cal. App. 17.

10. By amending the Findings of Fact so as to cover all material issues of fact raised by the pleadings and evidence and in respect of which findings are necessary to support the judgment. 64 C.J. 1232, 1233.

11. By striking from the Conclusions of Law, paragraph I, the word “correctly” and inserting the word “incorrectly” upon the grounds that upon the facts and evidence presented, the plaintiffs erroneously reported their taxable income upon their returns filed upon March 15, 1947.

12. By striking from the Conclusions of Law, paragraph II, the word “earned” upon the grounds that plaintiff William P. Neil “earned” no portion of the partnership income.

13. By striking from the Conclusions of Law,

paragraph II, the words “\$28,568.21, \$14,284.10, and \$14,283.11” and inserting therein the following words, respectively, “\$19,456.39, \$9,728.19, and \$9,728.20” upon the grounds that taxable income of the plaintiffs for the calendar year 1946 was established to be such by the facts and evidence herein.

14. By striking from the Conclusions of Law, paragraph IV, the word “properly” and inserting the word “improperly” upon the grounds that the facts and evidence herein clearly show that plaintiffs overpaid their income taxes for the calendar year 1946.

15. By striking the entire “Conclusions of Law” upon the grounds that the court having stated in its “opinion” that the “equities are with the plaintiffs in this action and they should not be called upon to pay tax on income which they did not actually receive or benefit from” cannot adopt Conclusions of Law supporting an adverse judgment against plaintiffs. In *Eisner vs. Macomber*, 252 U.S. 189, the Supreme Court defined “income” as [51] “The gain derived from capital, from labor, or from both combined provided it be understood to include profit gained through a sale or conversion of capital assets”. The Sixteenth Amendment to the Constitution of the United States limits the power of Congress to tax as income what is not in fact income. It must be income in truth and substance without regard to form. This limitation is not to be overridden by Congress or disregarded by the courts (*Montgomery’s Federal Income Taxes on Corporations and Partnerships*, 1948-49, Volume I, page 4).

Said motion will be made and based upon this notice, and upon the pleadings, papers, records and files in this action.

Dated this 12th day of June, 1951.

/s/ PRESTON D. OREM,
Attorneys for Plaintiffs. [52]

Affidavit of Service by Mail attached. [53]

[Endorsed]: Filed June 14, 1951.

United States District Court, Southern Division of
California, Central Division

Date: July 16, 1951 At Los Angeles, Calif.

[Title of Cause.]

Present:

The Hon. Harry C. Westover, District Judge.

Deputy Clerk, E. M. Enstrom, Jr. Reporter, S. J. Trainor. Counsel for Plaintiff, P. D. Orem. Counsel for Defendant: Eugene Harpole, Spec. Att'y, Bur. Int. Rev.

MINUTES OF THE COURT

Nature of Proceedings:

1. Hearing motion of plaintiffs, filed June 14, 1951, to vacate judgment.
2. Hearing motion of plaintiffs, filed June 14, 1951, for new trial.
3. Hearing motion of plaintiffs, filed June 14,

1951, to amend findings of fact and conclusions of law.

Ruling:

Ordered: motions denied.

EDMUND L. SMITH,
Clerk,
By E. M. ENSTROM, Jr.,
Deputy Clerk.

[54]

[Title of District Court and Causes 12,041-12,042.]

NOTICE OF APPEAL

Notice is hereby given that Mary Neil and William P. Neil, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on June 7, 1951, in the above entitled consolidated cases. Said plaintiffs further appeal from the order of the court denying plaintiffs motion to vacate and set aside the said judgment, which said order was made and entered on or about July 16, 1951.

/s/ PRESTON D. OREM,
Attorney for Appellants Mary Neil and William P.
Neil.

[55]

[Endorsed]: Filed July 30, 1951.

[Title of District Court and Causes 12,041-12,042.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

The plaintiffs above named now designate the portion of the record, proceedings and evidence herein to be contained in the record on appeal in the foregoing consolidated cases, as follows:

1. The Complaints in each action.
2. The Answers in each action.
3. Stipulation of Facts, together with all eight of the original exhibits referred to in the Stipulation of Facts and filed with the Court.
4. Opinion. [56]
5. Findings of Fact and Conclusions of Law, together with the direction for the entry of judgment thereon.
6. Judgment.
7. Notice of Motion to Vacate Judgment.
8. Notice of Motion for New Trial.
9. Notice of Motion to amend Findings of Fact and Conclusions of Law.
10. Minute Orders of Court denying the respective motions to vacate judgment, for new trial, and to amend the findings.

STATEMENT OF POINTS

Plaintiffs intend to rely upon the following points in connection with their appeal:

1. That Judge Harry C. Westover, who presided at the trial of this action, was disqualified to

try the action or to render a judgment therein under the provisions of Section 455 of Title 28 of the Federal Judicial Code. Therefore, plaintiff's motion to vacate the judgment should have been granted.

2. That the distributive share of plaintiffs in the partnership income of the partnership of William P. Neil and Le Roy D. Owen, partners in a real estate brokerage business under the name of Le Roy D. Owen Co., for the calendar year 1946, was \$19,456.39, and not \$28,568.21 as found by the Court. Therefore, plaintiffs should prevail in these actions.

Dated: August 1, 1951.

/s/ PRESTON D. OREM,
Attorney for Appellants Mary Neil and William P.
Neil. [57]

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 2, 1951.

[Title of District Court and Causes 12,041-12,042.]

COUNTER DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Comes Now the Defendant - Appellee, United States of America, and hereby designates in addition to those portions of the record and proceedings in each of the above entitled cases, designated by plaintiffs-appellants herein, the following portions of record and proceedings to be contained in

the record on appeal of these cases to the United States Court of Appeals for the Ninth Circuit as follows:

1. Minute Order of Court dated January 8, 1951.
2. Transcript of Proceedings of January 8, 1951.
3. Minute Order of Court dated April 2, 1951.
4. Transcript of Proceedings of April 2, 1951.
5. Transcript of Proceedings of July 16, 1951.

Dated: This 7th day of August, 1951.

ERNEST A. TOLIN,

United States Attorney,

E. H. MITCHELL and

EDWARD R. McHALE,

Assistant U. S. Attorneys,

EUGENE HARPOLE and

FRANK W. MAHONEY,

Special Attorneys,

Bureau of Internal Revenue.

/s/ By EUGENE HARPOLE,

Attorneys for United States of America, Defendant-Appellee. [60]

Affidavit of Service by Mail attached. [61]

[Endorsed]: Filed Aug. 8, 1951.

[Title of District Court and Causes 12,041-12,042.]

ORDER FOR EXTENSION OF TIME TO FILE
RECORD ON APPEAL

The Motion of the Plaintiffs herein for an extension of time to file the record on appeal with the Circuit Court of Appeals for the Ninth Circuit, to allow an additional thirty (30) days to and including the 9th day of October, 1951 for the purpose of filing said record on appeal with the said Circuit Court of Appeals for the Ninth Circuit, having been filed and good cause having been shown for the granting of said Motion;

It Is Ordered that the plaintiffs herein shall have an extension of time to and including the 9th day of October, 1951 for the purpose of filing the record on appeal herein with the Circuit Court of Appeals for the Ninth Circuit.

Dated: This 4th day of September, 1951.

/s/ HARRY C. WESTOVER,
United States District Judge. [62]

[Endorsed]: Filed September 4, 1951.

[Title of District Court and Causes 12,041-12,042.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 62, inclusive, contain the original Complaint and Answer in each of the above entitled causes; Opinion; Findings of Fact and Conclusions of Law; Judgment; Notice of Motion to Vacate Judgment; Notice of Motion for New Trial; Notice of Motion to Amend Findings of Fact and Conclusions of Law; Notice of Appeal; Two Designations of Record on Appeal and Order Extending Time to Docket Appeal and a full, true and correct copy of minute orders entered January 8, April 2 and July 16, 1951 which together with original Joint Exhibit No. 1 and original reporter's transcript of proceedings on January 8, April 2 and July 16, 1951, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$3.20 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 21st day of September, A.D. 1951.

[Seal]

EDMUND L. SMITH,
Clerk.

/s/ By THEODORE HOCKE,
Chief Deputy.

[Title of District Court and Causes 12,041-12,042.]

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California,

January 8, 1951, 10:00 o'clock a.m

The Clerk: No. 12041 and No. 12042, Neil vs. U.S.A.

Mr. Orem: I would like to direct attention to the fact that the period during which these taxes were assessed was while the court was Collector of Internal Revenue.

The Court: Well, I know nothing at all of this case.

Mr. Orem: I would just as soon keep it here.

The Court: If you have any objection, I will be glad to transfer it out.

Mr. Orem: I think we can stipulate——

Mr. Mitchell: I think it will take two days to try this.

The Court: First, I want to know, are you willing for this court to try the issues?

Mr. Mitchell: The government is, of course.

Mr. Orem: I am agreeable.

The Court: How many days will it take?

Mr. Orem: The facts have to be proven. Probably two days is not too long.

Mr. Mitchell: We will stipulate, of course, all verifiable facts that are material.

The Court: How about April 2nd?

Mr. Mitchell: That is agreeable.

Mr. Orem: Satisfactory.

The Court: I will make an order consolidating the two cases at this time.

(Thereupon, an adjournment was taken until April 2, 1951.)

Monday, April 2, 1951, 10:00 a.m.

The Clerk: No. 12041 and No. 12042, Neil vs. U.S.A.

Mr. Orem: Ready for the plaintiff.

Mr. Mitchell: Ready for the defendant. The parties have reduced the facts to a written stipulation of facts and exhibits which we now file with the clerk.

The Court: If you have stipulated as to the facts, what is there left in this case?

Mr. Orem: Testimony as to two points, your Honor, which I can testify to myself, a couple of points Mr. Mahoney wasn't able to check with the auditor. There is one thing the auditor didn't check, I know, but I can testify to that myself. It won't take over five minutes.

There is also a stipulation which more or less amends Article 11 of this stipulation of facts.

The Court: Before proceeding with this case, I have raised this issue before, and you said you were perfectly willing to continue with the matter. I also want to raise it again, because I don't want you to come in a little later on and say you have been penalized in any way. It appears from the pleadings that when this income tax return was originally filed, I was Collector of Internal Revenue. I said once

before I never heard of the case, don't know anything about the case. I don't know any reason in the world why I would be biased or prejudiced for or against either party, but I am bringing it to your attention right now.

Mr. Orem: At the time before, Mr. Mitchell and myself both indicated we had no objection. In our stipulation of facts, we recite when you were Collector of Internal Revenue, so that again covers it. I again have no objection.

Mr. Mitchell: No objection on the part of the defendant, your Honor.

The Court: I want to be sure to have that in the record, because I don't want you a year from now or two years from now to say anything about it. All right, we can dispose of this tomorrow morning.

Mr. Orem: There is only one thing. There has been a trial brief filed by Mr. Mahoney. I didn't file one because I wanted to see whether we could get together on the facts.

The Court: Yes, there was a trial brief filed by the government. I don't know what the court can do when counsel don't follow the rules. I suppose if one counsel files a memorandum and one does not, we can take the statements in the one filed as true. I don't know.

Mr. Orem: I contemplate asking that the court allow us to file concurrent briefs.

The Court: Suppose we continue the matter to 10:00 o'clock in the morning. In the meantime I will have a chance to read your stipulation and look at your exhibits, and we can probably dispose of the

case tomorrow. Continue it until 10:00 o'clock tomorrow morning.

Monday, July 16, 1951, 10:00 a.m.

The Clerk: No. 12041 and 12042, Neil vs. U. S. A.

Mr. Mitchell: Ready, your Honor.

Mr. Orem: Ready.

Would your Honor like to hear an argument at this time?

The Court: I am not interested in an argument. However, if you want an argument, I will let you argue.

Mr. Orem: I am making a motion at this time to the effect that the court should disqualify himself from hearing any of these matters under Section 455.

The Court: You know, that doctrine is a personal doctrine, and if you can make an affidavit to the effect that I have a personal bias and prejudice against your clients, I would be glad to hear from you. But just a general affidavit is not sufficient.

Not only that, but I called your attention to the fact that I had been formerly Collector of Internal Revenue and I offered to transfer the case out of this court. I am certainly not going to disqualify myself after the case has been heard and I have rendered a decision.

Mr. Orem: It is my position that section is mandatory and not discretionary. The first part is mandatory.

The Court: I don't agree with you. Maybe the Circuit Court will, but I don't. I leaned over backwards to try to bring home to all these litigants that

have tax problems before that if they feel I have any bias or prejudice at all, I am glad to disqualify myself. As a general rule, as I did in this case, I got your consent before we ever proceeded.

Mr. Orem: That is true.

The Court: On two different occasions.

Mr. Orem: My motion is based on prejudice as a matter of law and not a personal prejudice.

The Court: I disagree. Your motion is denied.

Mr. Orem: Very well. Would the court care to hear an argument on the merits?

The Court: No. I am satisfied with the evidence. I am satisfied with the decision. The Circuit Court may not agree with me, but if they don't, that is too bad.

The motions are denied.

[Endorsed]: Filed Sept. 10, 1951.

[Endorsed]: No. 13109. United States Court of Appeals for the Ninth Circuit. Mary Neil and William P. Neil, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed September 24, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 13,109

MARY NEIL and WILLIAM P. NEIL,
Plaintiffs and Appellants,
vs.

UNITED STATES OF AMERICA,
Defendant and Respondent.

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD

Appellants will rely upon the following points:

1. That Judge Harry C. Westover, who presided at the trial of this action, was disqualified to try the action or to render a judgment therein under the provisions of Section 455 of Title 28 of the Federal Judicial Code. Therefore, appellants' motion to vacate the judgment should have been granted.

(a) Harry C. Westover, having been the Collector of Internal Revenue for the Sixth District of California at all times during the calendar year 1946, for which year the claims for refund of income taxes were made which form the subject matter of this case, and the income tax returns for that year having been filed and income taxes assessed thereon having been paid entirely within the said Sixth District of California, the judge who presided at the trial of this action in the lower court is the same person who was charged by law with the collection of the very income tax payments which are

now asked to be refunded. (Section 3641, Internal Revenue Code.)

(b) Therefore, Judge Harry C. Westover as said Collector of Internal Revenue, had a "substantial interest" in the collection of the income taxes to which this case relates, and was also an employee, agent and counsel for respondent in the collection of said taxes. Under said Section 455, therefore, the mandatory disqualification of the said trial judge is apparent.

(c) The consent of all parties to the action to the trial of the case by a judge who is subject to a mandatory disqualification under the provisions of said Section 455 does not remove the disability and he was disqualified despite the consent of appellant to his trial of the case.

2. Appellants are subject to income tax for the year 1946 only upon that portion of the partnership income of Roy D. Owen Company, a partnership composed of Le Roy D. Owen and William P. Neil, which was distributed or distributable to appellants during the year 1946.

(a) That appellants having been assessed, and having paid, income taxes for the year 1946 on \$28,568.21 of income from the said partnership and the share of said income distributed, and distributable, to appellants being \$19,456.39, they, having requested a refund of income taxes only upon partnership income in the amount of \$9,111.82, should be granted such a refund of income taxes.

(b) Where the interpretation of a federal statute is dependent upon the application of a state law, the

state rule will be followed. Accordingly, the \$9,111.82 of partnership income not being distributable to appellants during the year 1946 under the California laws relating to illegal partnerships, is not distributable to appellants within the provisions of the Internal Revenue Code relating to partnership income.

DESIGNATION OF RECORD

Appellants designate for inclusion in the record on appeal, all such portions of the record, proceedings and evidence as are included in the typewritten transcript of the record received by this court from the clerk of the District Court in the above entitled cause, and the reporter's transcript in the above cause.

Dated: September 28, 1951.

/s/ PRESTON D. OREM,
Attorney for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Sep. 29, 1951. Paul P. O'Brien,
Clerk.



No. 13109

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARY NEIL and WILLIAM P. NEIL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

PRESTON D. OREM,

315 West Ninth Street,
Los Angeles 15, California,

Attorney for Appellants.

FILED

DEC 13 1951

PAUL P. O'BRIEN
CLERK



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No. 13109

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARY NEIL and WILLIAM P. NEIL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment at law of the United States District Court for the Southern District of California, Central Division, in favor of the defendant, United States of America, to the effect that plaintiffs recover nothing by their respective complaints for refunds of federal income taxes. [Tr. pp. 5-6, 13-33.]

The District Court for the Southern District of California has jurisdiction of the actions under the provisions of Section 1331 of the Judicial Code.

The plaintiffs, who are husband and wife [Tr. pp. 17-25], filed separate actions, which were consolidated for trial. [Tr. pp. 32-33.]

The amount in controversy is \$5,181.78, together with interest as provided by law from March 15, 1947. [Tr. pp. 5-13.]

The pleadings necessary to show the jurisdiction of the District Court are the Complaints [Tr. pp. 3-8 and 11-13] and the Stipulation of Facts. [Tr. p. 17.]

The United States Court of Appeals for the Ninth Circuit has jurisdiction under Sections 1291-1294 of the Judicial Code.

The judgment of the District Court was entered on the 7th day of June, 1951. [Tr. p. 33.] On the 30th day of July, 1951, plaintiffs filed their notice of appeal. [Tr. p. 46.] An order extending plaintiffs' time to file the record on appeal to and including the 9th day of October, 1951, was filed on the 4th day of September, 1951. [Tr. p. 50.] The original transcript of record on appeal was certified by the Clerk of the District Court on the 21st day of September, 1951 [Tr. p. 51], and was filed in the Office of the Clerk of this Court on the 24th day of September, 1951.

Statement of the Case.

The facts herein were stipulated. [Tr. pp. 17-24.]

Appellants were, and are, husband and wife, residing and having their principal place of business in the County of Los Angeles, State of California. All taxable income of appellants for the year 1946 was community income. [Tr. p. 17.]

At all times during the period from July 1, 1943, to October 31, 1949, Harry C. Westover was the Collector of Internal Revenue for the Sixth District of California. [Tr. p. 18.]

Appellants filed their separate original income tax returns for the calendar year 1946 on March 15, 1947, in the Sixth District of California. Appellants reported upon their returns, a total of \$28,568.21 as income from the partnership of "Le Roy D. Owen Co." [Tr. p. 18; Exs. 1-2.]

At all times during the period from December 1, 1943, to September 30, 1946, William P. Neil and Le Roy D. Owen were partners in a real estate brokerage business under the name of "Le Roy D. Owen Company"; Le Roy D. Owen being the only general partner, and William P. Neil being the only limited partner. At all times during the life of the partnership, the assets and books were in custody of Le Roy D. Owen. [Tr. pp. 18-19.]

At no time was the said partnership licensed to do a real estate brokerage business by the Division of Real Estate of California, but Le Roy D. Owen held an indi-

vidual real estate broker's license to do business as "Le Roy D. Owen Co.," and transacted the real estate brokerage business of the partnership under such individual license. [Tr. p. 19.] During the year 1946, approximately 95% of the income of the partnership was from commissions on real estate sales. [Tr. p. 25.]

All of the partnership capital was contributed by William P. Neil during the years 1943 and 1944, and his entire capital contribution was returned to him by the partnership prior to September 30, 1946 [Tr. p. 19], upon which date the partnership was dissolved. [Tr. p. 21.]

A delinquent partnership income tax return for the calendar year 1946 was filed in the Sixth District of California on February 18, 1949, by William P. Neil, showing the net income of the partnership for the year 1946 to be \$63,719.67, which is in agreement with the partnership books. [Tr. p. 20, Ex. 4.] Upon the said partnership income tax return, the partner's share of the net income was reported as follows: Le Roy D. Owen, \$44,263.28; William P. Neil, \$19,456.39. [Ex. 4.]

The only distributions of income by the partnership to William P. Neil at any time were as follows [Tr. pp. 21-22]:

Date	Type and Amount	
September 11, 1946	Cash,	\$ 1,007.00
November 21, 1946	Cash,	3,505.87
November 21, 1946	Stocks, at cost to partnership	23,358.59
	Total	<hr/> \$27,871.46

The foregoing amount of \$27,871.46 was reported as net taxable distributive income of William P. Neil upon the partnership income tax return filed in the Sixth District of California as follows [Tr. p. 20, Ex. 4]:

Year		Amount
1943	Loss,	\$ 303.35
1944	Income,	1,809.14
1945	Income,	6,909.28
1946	Income,	19,456.39
Total Net Income		<u>\$27,871.46</u>

Appellants reported as net taxable income from the partnership upon their individual income tax returns, the following [Tr. pp. 18-20; Ex. 4]:

Year	Amount
1943-1944-1945	\$ 8,415.07
1946	28,568.21
Total Net Income	<u>\$36,983.28</u>

The excess of the total partnership net income reported upon the individual income tax returns of appellants, and income taxes paid thereon [Tr. p. 18], over the total distributions of income by the partnership to appellants is as follows:

Total share of partnership net income reported by appellants,	\$36,983.28
Total share of partnership net income received by appellants,	27,871.46
Excess partnership income reported by appellants; income tax thereon paid by appellants	<u>\$ 9,111.82</u>

Claims for refunds of individual income taxes were filed by appellants on May 13, 1949, and May 15, 1949, in the Sixth District of California. [Tr. p. 23.] Said claims for \$2,590.89 by each appellant were based entirely upon the fact that partnership net income of appellants for the year 1946 had been incorrectly reported, and taxes paid thereon, upon the original income tax returns filed by appellants to the extent of \$9,111.82. [Exs. 7-8.]

On March 7, 1947, William P. Neil filed a complaint against Le Roy D. Owen for money due on contract in the Superior Court of the State of California in and for the County of Los Angeles, alleging that said defendant owed him \$5,360.38, plus an interest in certain contingent commissions receivable. The complaint was based upon a certain alleged oral agreement between the parties entered into on November 21, 1946, for the division of the assets of the partnership (Le Roy D. Owen Company) remaining in the possession of Le Roy D. Owen. [Ex. 5, pp. 1-6.] Thereafter, various demurrers being sustained by Judges Scott, Barnes and Ashburn to the original complaint and three amended complaints [Ex. 5], finally upon February 7, 1949, judgment was entered in favor of defendant, Allen W. Ashburn, Judge, ruling that the third amended complaint failed to state a cause of action. Plaintiff appealed and on October 4, 1949, the parties dismissed the appeal after payment of \$1000 by defendant Owen to plaintiff Neil. [Tr. p. 22.]

Pleadings and Proceedings Herein.

The respective complaints of appellants for recovery of taxes illegally assessed and collected were filed on August 4, 1950. The complaints alleged the assessment and the payment of the 1946 income taxes to Harry C. Westover as Collector of Internal Revenue on or about March 15, 1947; filing of refund claims with the said Collector on or about May 15, 1949; that no part of said refunds had been made; that six months had elapsed since the filing of the refund claims. Copies of the respective refund claims were attached to the respective complaints as Exhibits "A" thereof. In each complaint, the plaintiff asked for judgment in the sum of \$2,590.89, with interest as provided by law from March 15, 1947, for costs of suit and general relief. [Tr. pp. 3-8 and 11-13.]

Answers to the complaints were filed on November 9, 1950. The answers admitted the payment of the taxes, filing of the claims for refund and that no refunds had been made. Otherwise, the answers denied the allegations of the complaints. [Tr. pp. 9-10 and 14-15.]

A Stipulation of Facts was entered into between the appellants and appellee and filed on April 2, 1951. [Tr. pp. 17-24.]

The two cases had been consolidated for trial on January 8, 1950, at the time the cases were set for trial. [Tr. pp. 15-16.]

After trial on April 3, 1951, the cases were submitted to Hon. Harry C. Westover, District Judge, principally

on the Stipulation of Facts and the exhibits attached thereto. [Tr. p. 16.]

Findings of Fact and Conclusions of Law were made and filed [Tr. pp. 28-32], and on June 7, 1951, judgment was entered for appellee to the effect that plaintiffs take nothing by their complaints and defendant recover its cost of suit. [Tr. pp. 32-33.]

Appellants thereafter moved to vacate the judgment [Tr. pp. 34-36], for a new trial [Tr. pp. 37-39], and for amendments to the findings. [Tr. pp. 39-45.]

All of the foregoing motions were denied by the Hon. Harry C. Westover, District Judge, on July 16, 1951. [Tr. pp. 45-46.]

Questions Involved.

The questions involved in this appeal are:

1. Was Judge Harry C. Westover, who presided at the trial of this action, disqualified to try the action or to render a judgment therein under the provisions of Section 455 of Title 28 of the Federal Judicial Code, so that appellant's motion to vacate the judgment should have been granted?

2. Are appellants subject to income tax for the year 1946 only upon that portion of the partnership net income of Le Roy D. Owen and William P. Neil, which was *distributed* or *distributable* to appellants during the year 1946?

3. What is the amount of the said partnership net income which was *distributed* or *distributable* to appellants during the year 1946?

Specification of Errors.

Appellants specify the following errors upon which they will rely in the prosecution of this appeal from the judgment of the District in this cause made and entered on June 7, 1951:

1. The District Court erred in denying appellant's motion to vacate the judgment. [Tr. pp. 45-46.] The trial judge was disqualified to rule upon the said motion.

2. The District Court erred in finding that \$28,568.21 of the net income of the partnership was distributable to William P. Neil for the year 1946. [Finding V, Tr. p. 30.]

3. The District Court erred in concluding that the distributive share of William P. Neil in the "earned" income of the partnership for the year 1946 was \$28,568.21 and that appellants properly reported such sum as taxable income for the year 1946 under the provisions of Sections 180 to 183 of the Internal Revenue Code. [Conclusions of Law II, Tr. p. 31.]

4. The District Court erred in concluding that the income taxes for the calendar year 1946 were "properly" collected from appellants. [Conclusions of Law III, Tr. p. 31.]

5. The District Court erred in denying the motions for a new trial and to amend the findings. [Tr. pp. 45-46.]

ARGUMENT.

I.

The District Court Erred in Denying Appellant's Motion to Vacate the Judgment. The Trial Judge Was Disqualified to Rule Upon the Said Motion.

Title 28, Section 455, *Federal Judicial Code*, reads as follows:

“Interest of justice or judge. Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal or other proceedings therein.” (June 25, 1948, c. 646, No. 1, 62 Stat. 908.)

The foregoing section contains both a mandatory disqualification, and a discretionary disqualification. Even although the parties to the action attempt to waive the disqualification, there can be no waiver if the disqualification is based on absolute prohibition in a statute against a disqualified judge sitting in the case. (48 C. J. S. 1101.) The words of Section 455 cited above (“shall disqualify himself in any case in which he has a substantial interest, has been of counsel”) are clearly mandatory, not discretionary. Up to the first word “or,” Section 455 is mandatory; thereafter, it becomes discretionary in respect to leaving the decision to the trial judge as to whether his relation or connection to a party or his attorney renders it improper for him to preside in the trial of the action.

Referring to the assessment and collection of federal income taxes, Section 3641, *Internal Revenue Code*, states:

“The Commissioner shall certify a list of such assessments, when made to the proper collectors, respectively, who shall proceed to collect and account for the taxes and penalties so certified.”

At all times from July 1, 1943, to October 31, 1949, District Judge Harry C. Westover, who presided at the trial of this action, was the Collector of Internal Revenue for the Sixth District of California. [Stipulation of Facts V, Tr. p. 18.] Thus the judge who tried this case was the same person who, in his prior official capacity as Collector of Internal Revenue, was charged with the duty of collecting, and did collect, the very income tax assessments, upon the alleged overpayment of which appellants based these actions.

Therefore, Judge Harry C. Westover, as said Collector of Internal Revenue, had a “substantial interest” and had “been of counsel” in the assessment and collection of the income taxes to which these cases relate. He was an employee and agent of appellee in the assessment and collection of the said income taxes. Under Section 455 of the *Federal Judicial Code*, previously cited, the mandatory disqualification of the said trial judge to try the case, or to pass upon the motion to vacate the judgment, is apparent.

In the case of *United States v. Vasilick* (C. C. A. 3), 160 F. 2d 631, reversing 68 Fed. Supp. 725, it was held that where a district judge had been district attorney at the time of the trial and conviction of the defendant, he could not act as a judge on a motion to vacate judgment. As district attorney, he had been “of counsel” in all cases

in his district. His disqualification was not a matter for the *exercise of his own discretion* but was *unconditional and absolute*.

Appellants do not allege, and have not alleged, bias or prejudice upon the part of Judge Westover. But appellants do contend that his disqualification is mandatory under the terms of Section 455 of the *Federal Judicial Code, supra*, as enacted on June 25, 1948.

II.

The District Court Erred in Finding That \$28,568.21 of the Net Income of the Partnership Was Distributable to William P. Neil for the Year 1946.

Section 182(c) of the *Internal Revenue Code* provides that:

“in computing the net income of each partner, he shall include, whether or not distribution is made to him”

“(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183(b).”

The only distributions of income by the partnership to William P. Neil at any time were as follows [Tr. pp. 21-22]:

Date	Type and Amount
September 11, 1946	Cash \$ 1,007.00
November 21, 1946	Cash 3,505.87
November 21, 1946	Stocks, at cost to partnership 23,358.59
Total	<hr/> \$27,871.46

The foregoing amount of \$27,871.46 was reported as net taxable distributive income of William P. Neil upon the partnership income tax returns filed in the Sixth District of California as follows [Tr. p. 20; Ex. 4]:

Year		Amount
1943	Loss,	\$ 303.35
1944	Income,	1,809.14
1945	Income,	6,909.28
1946	Income,	19,456.39
Total Net Income		<hr/> \$27,871.46

Appellants, it is true, erroneously reported as net income from the partnership upon their individual income tax returns for the year 1946 the sum of \$28,568.21 and paid income tax thereon. [Tr. p. 18.]

However, the difference between the \$28,568.21 of partnership net income reported by appellants and the amount of \$19,456.39 shown in the table above and actually received by William P. Neil, which is \$9,111.82, represents that portion of the partnership net income retained by Le Roy D. Owen, general partner, in Le Roy D. Owen Co. under a "claim of right," which theory of said Owen was upheld by the California Courts. [Ex. 5.]

During the year 1946, approximately 95% of the income of the partnership was from commissions on real estate sales. [Tr. p. 25.] Neither the partnership or Neil had a real estate broker's license, but Owen held an individual real estate broker license and transacted the partnership real estate business under such license. [Tr. p. 19.]

Section 10137 of the *Business & Professions Code* of the State of California states, in part:

“It shall be unlawful for any licensed real estate broker to employ or compensate, directly or indirectly, any person for performing any of the acts within the scope of this Chapter who is not a licensed real estate broker, or a real estate salesman licensed under the broker employing or compensating him.”

Section 10137 clearly ascribes to Le Roy D. Owen, as earned income, those real estate commissions constituting 95% of the partnership income in that it prohibits directly the sharing of such commissions by Owen with an unlicensed person (Neil).

The laws of California make it unlawful for any *person* to engage in the business of a real estate brokerage without first obtaining a California license. (*Bus. & Prof. Code*, Sec. 10130.) The word “person” includes a co-partnership. (*Bus. & Prof. Code*, Sec. 10006.)

Should a licensed real estate broker engage in a joint venture or partnership with an unlicensed person, the licensed real estate broker may collect and retain the entire commissions earned by the two persons. (*Wise v. Radis*, 74 Cal. App. 765, 242 Pac. 90.)

In *Wise v. Radis*, it was held that an agreement of real estate brokers to carry on a joint venture and divide the profits constituted a “partnership.” One commission was earned on January 10, 1922. Although plaintiff received his California real estate broker’s license upon January 31, 1922, it was held that he could not recover from the defendant, a licensed real estate broker as of January 10, 1922, any part of the commission earned. The “partnership” was held to be an illegal one.

Judge Allen W. Ashburn, of the Superior Court of Los Angeles County, in awarding judgment to defendant in the case of *Neil v. Owen* [Ex. 6], stated that the case of *Del Rey Realty Co. v. Fournl*, 44 Cal. App. 2d 397, 403, 112 P. 2d 649, was most like *Neil v. Owen*. In the *Del Rey* case, an unlicensed real estate broker obtained an oil lease for defendant under a contract calling for a 10% interest in the sublease as compensation. A written instrument assigning the interest was delivered, but in a suit on this separate instrument, the court denied recovery, holding that the action was, in effect, to enforce the original illegal contract.

William P. Neil, not being a licensed real estate broker, and the partnership not being licensed, the conduct of the partnership under the license of Le Roy D. Owen constituted the performance of an illegal contract. Le Roy D. Owens, as the only licensed real estate broker, is the only one entitled to the commissions earned. Therefore, they are, and were, “distributive” only to Le Roy D. Owen.

In defendant’s answer to the third amended complaint in the case of *Neil v. Owen*, as a second separate defense, defendant alleged as follows:

“Plaintiff and defendant purported to enter into a real estate brokerage business and plaintiff failed to obtain a license from the State of California in accordance with the provisions of the laws of the State of California. That by reason thereof the alleged partnership between plaintiff and defendant was ille-

gal, contrary to and prohibited by law, and further, all moneys claimed due by plaintiff in his action are commissions earned as a result of real estate brokerage transactions. Defendant is prohibited by law from paying plaintiff, an unlicensed person, directly or indirectly, any of such commissions. By reason thereof plaintiff seeks the aid of this court in consummating an illegal transaction, and on grounds of public policy the court should leave plaintiff and defendant where it finds them.” [Ex. 5.]

Where taxpayer receives earnings under claim of right and without restriction as to its disposition, he has received income which he is required to include in his income tax return, even though it may still be claimed that he is not entitled to retain money, and even though he may still be adjudged liable to restore its equivalent. (*United States v. Lewis* (March 26, 1951), 71 S. Ct. 522.)

Applying the ruling in the foregoing case, Le Roy D. Owen receiving the real estate brokerage commissions earned in his capacity as a licensed real estate broker, held such commissions under a “claim of right” as “Le Roy D. Owen, doing business as Le Roy D. Owen Company.” [Tr. p. 19.] Therefore, he received commissions reportable upon his individual income tax return for the year 1946. William P. Neil did not receive such reportable commissions from the partnership, or Le Roy D. Owen, and the California Courts held that he could not maintain a suit against Le Roy D. Owen for the paying over of such commissions to him.

The "claim of right" interpretation of the tax laws has long been used to give finality to that period (annual accounting period), and is now deeply rooted in the federal tax system. (*United States v. Lewis, supra.*) The Supreme Court in the *Lewis* case also refers to cases collected in 2 *Mertens, Law of Federal Income Taxation*, Section 12.103. The *Lewis* case, and its implications, is discussed in *Michigan Law Review*, Volume 49, No. 8, page 1251 (June, 1951).

The Court below appears to have completely misinterpreted the *Lewis* case, as in the Opinion [Tr. p. 26] it is stated that "Income taxes must be paid on earned income." (*United States v. Ellis R. Lewis*, Sup. Ct. No. 347, October Term, 1950.) The *Lewis* case contains no statement of this obvious fact, which is not pertinent to this proceeding as the question herein is, actually, whether a particular segment of partnership income was "distributive" to Neil. (*Int. Rev. Code*, Sec. 182(c), *supra.*)

In *Reinschmidt v. Commissioner of Internal Revenue* (C. C. A. 5), 28 F. 2d 660, reversing the Board of Tax Appeals, Reinschmidt, a partner, entered income on his books in 1920, believing another partner had agreed to his receiving such income from a sale of partnership goods. In 1921, the other partners disclaimed having made such an agreement, and plaintiff adjusted his books accordingly. The Court held that plaintiff was not taxable on the income in 1920, never having received it and being unable to claim it.

In this proceeding, plaintiffs are in the same situation. Although they reported a certain share of the income of the partnership of Le Roy D. Owen in their 1946 individual income tax returns, it was not their “distributive” share of commissions earned by the partnership. They could not assert a claim to it as the California Courts held that it rightfully was earned by Le Roy D. Owen under the terms of his individual California real estate broker’s license.

However, Le Roy D. Owen did turn over certain cash and securities to William P. Neil during the calendar year 1946. [Tr. pp. 21-22.] The partnership basis of these assets was reported as the distributive share of plaintiffs in the partnership income tax returns for the years 1943, 1944, 1945 and 1946. [Tr. p. 20.] As plaintiffs, after receiving such distributions held them under a “claim of right” (*United States v. Lewis, supra*), plaintiffs are subject to income tax upon these distributions in accordance with the portion of the partnership income allocated to William P. Neil as his share of ordinary net income in the partnership return filed for the calendar year 1946. [Ex. 4.] With respect to the remaining partnership income for the year 1946, the general partner, Le Roy D. Owen, has at all times held the assets representing such income in his possession, and the income, under a “claim of right.” Therefore, Le Roy D. Owen is taxable upon his full distributive share (\$44,-263.28) of partnership income for the year 1946 [Ex. 4] and plaintiffs are taxable upon no portion thereof.

III.

The District Court Erred in Concluding That the Distributive Share of William P. Neil in the "Earned" Income of the Partnership for the Year 1946 Was \$28,568.21 and That Appellants' Properly Reported Such Sum as Taxable Income for the Year 1946 Under the Provisions of Sections 180 to 183 of the Internal Revenue Code.

There is no dispute between the parties with respect to the "earned" income of the partnership for the year 1946, which was \$63,719.67. [Tr. p. 20.]

The dispute relates to the distributive share of appellants in the said "earned" income of the partnership.

As a limited partner [Tr. p. 19], William P. Neil furnished the partnership capital [Tr. pp. 19-20], but could take no active part in the management of the business of the partnership. (*Calif. Corp. Code*, Secs. 15501-15531 (Uniform Limited Partnership Act).) The books and assets of the partnership were at all times in the custody of the only general partner, Le Roy D. Owen [Tr. p. 19].

Section 116(a)(3) of the *Internal Revenue Code* defines "earned income" as follows:

"Wages, salaries, professional fees and other amounts received as compensation for personal services actually rendered."

This definition is similar to former Section 25(a)(4) of the *Internal Revenue Code* repealed by Section 107 of the *Revenue Act of 1943*, in connection with the repeal of the earned income credit. (5 *Merten's Law of Federal Income Taxation*, Sec. 32.05.)

Under the terms of the foregoing definition, no part of appellant William P. Neil's distributive share of the net income of the partnership during 1946 was "earned income" as to him.

The Court below appears to be confused as to the concept of "earned income." In the Opinion [Tr. p. 26], the statement is made that:

"Income taxes must be paid on earned income (*United States v. Ellis R. Lewis*, Supreme Court No. 347)."

The foregoing statement is not disputed by appellants, but is wholly inapplicable to the facts of this case.

Judge Westover appears to have been misled by two principal factors in promulgating what, in the opinion of appellants, is an erroneous opinion. First, he misconstrued the decision in the case of *United States v. Ellis R. Lewis*, *supra*, and the implications of that decision. Second, he was misled by his erroneous conception of the phrase "earned income" as applied to federal income taxes.

The opinion below states, with respect to the "equities" [Tr. p. 27]:

"Although we feel that the equities are with the plaintiffs in this action and they should not be called upon to pay tax on income which they did not actually receive or benefit from, nevertheless the law is well established that although income is not actually received, taxpayers are required to pay tax if the income is earned income."

Here again appears the phrase "earned income." Judge Westover now grounds his decision upon the phrase and his erroneous conception of it. Appellant William P.

Neil was taxable upon his "distributive share" of the net income of the partnership. (*Int. Rev. Code*, Sec. 182(c).) Whether such distributive share was "earned income" to him, or not, is wholly immaterial, but as a matter of income tax law, William P. Neil's "distributive share" of the partnership net income was wholly "unearned income."

IV.

The District Court Erred in Concluding That the Income Taxes for the Calendar Year 1946 Were "Properly" Collected From Appellants.

Here, Judge Westover concludes that the very income taxes which he, in his former capacity as Collector of Internal Revenue, collected from appellants were "properly" collected by him. However, as previously stated, he found the equities to be with appellants herein. [Tr. p. 27.]

In *Republic Oil Refining Co. v. Granger* (D. C. Pa., June 21, 1951), 98 Fed. Supp. 921, it is said:

"The local rule will be followed whenever the applicability of a federal revenue statute is dependent upon fact which can be interpreted only in accordance with state rules of property.

"A thing which is within the letter of statute imposing a tax is not within the statute unless it is within intention of congress."

Thus, the provisions of the *Business & Professions Code of California* applicable to this case cannot be ignored. Neither can it be inferred that the intention of Congress in enacting Sections 180 to 183 of the *Internal Revenue Code* was to levy an income tax on the partner

not receiving partnership income, instead of upon the partner receiving and retaining under the provisions of state law, the partnership income that is in issue here.

In *Alexander H. Kerr & Co. v. U. S. A.* (S. D. Calif. C. D., April 25, 1951), 97 Fed. Supp. 796, it is said:

“The right to receive income, and not actual receipt, determines inclusion of an amount in gross income under accrual system.”

Appellants herein under the laws of the State of California as interpreted by its courts, had neither the right to receive the income in issue here, nor did they ever receive it.

In *Alexander, et al. v. Commissioner of Internal Revenue* (C. C. A. 5, August 7, 1951), 190 F. 2d 753, the Fifth Circuit said:

“The purpose of the revenue laws is the taxation of income to those who earn or otherwise create the right to receive it and enjoy the benefit of it when paid.”

Appellants neither earned the income in question, had the right to receive it, or enjoyed the benefit of it.

A very recent case clearly interprets the rule set forth in *United States v. Lewis, supra*, relied upon by the Court below in its opinion, as follows:

“A taxpayer, receiving earnings under claim of right without restriction as to disposition thereof, receives ‘income,’ which he must return for taxation, notwithstanding claim that he is not entitled to re-

tain money and possibility that he may be adjudged liable to restore its equivalent. 26 U. S. C. A. 22(a), 42(a); U. S. C. A. Const. Amend. 16.” (*Mutual Tel. Co. v. U. S. A.* (Sept. 28, 1951), 100 Fed. Supp. 164.)

The foregoing statement, as applied to the facts here, clearly charges Le Roy D. Owen with the income tax upon the partnership earnings he received, held under a claim of right, and successfully resisted the attempt of appellant Neil to take from him.

V.

The District Court Erred in Denying the Motions for a New Trial and to Amend the Findings.

Appellants believe that the foregoing arguments have previously covered this specification of error.

Conclusion.

For the foregoing reasons, appellants urge:

1. That the action of the District Court in denying appellants' motion to vacate the judgment be reversed and the case remanded to the District Court with instructions to grant a new trial before a District Judge other than Judge Harry C. Westover.

2. In the alternative, that the judgment of the District Court be reversed and the case remanded to the District Court with instructions to enter judgment in favor of appellants.

Respectfully submitted,

PRESTON D. OREM,

Attorney for Appellants.



No. 13109

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARY NEIL and WILLIAM P. NEIL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the
Southern District of California.

BRIEF FOR THE UNITED STATES.

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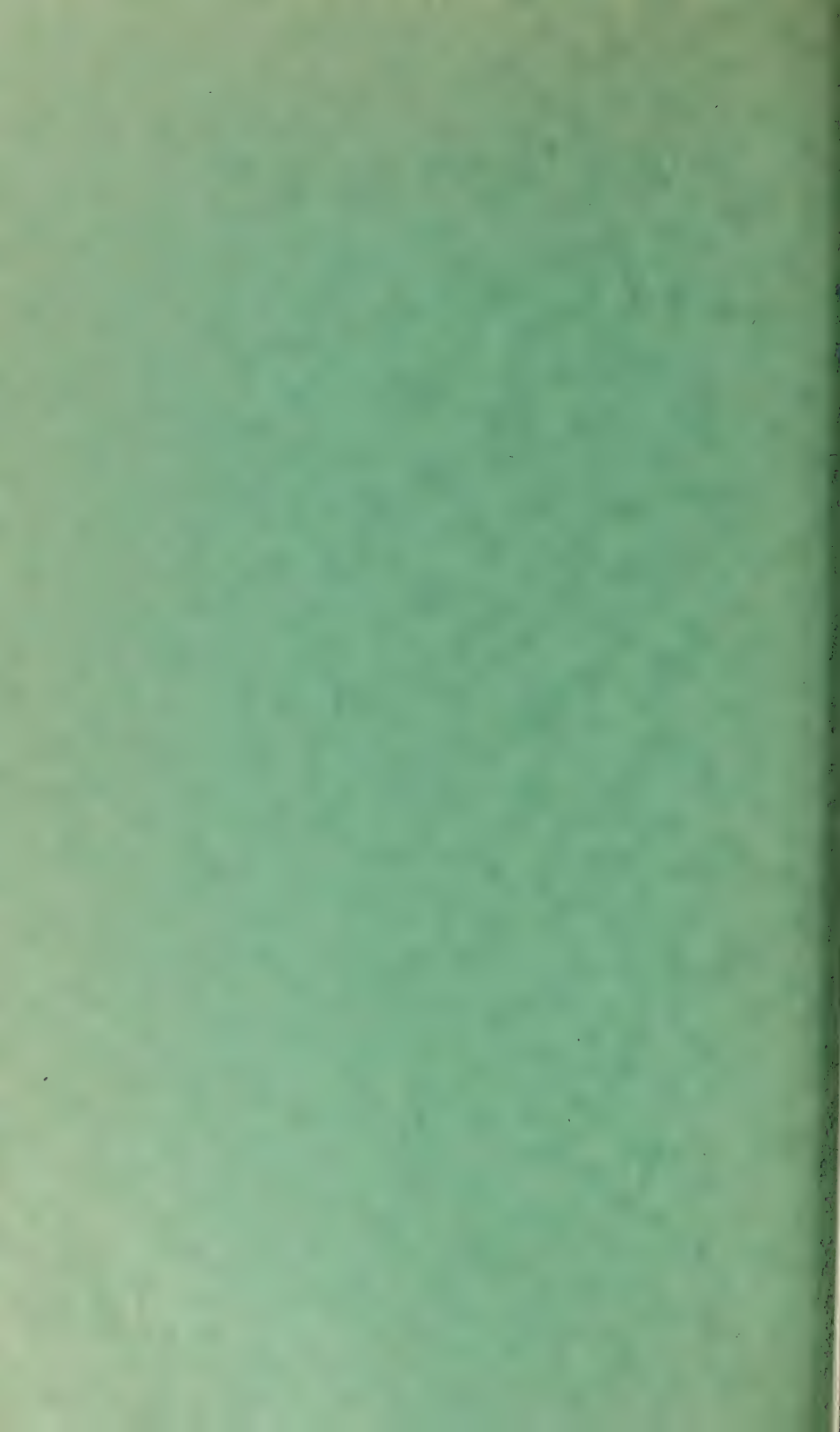
Los Angeles 12, California,

FILED

JAN 16 1952

PAUL P. O'BRIEN

CLERK



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No. 13109

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARY NEIL and WILLIAM P. NEIL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE UNITED STATES.

Opinion Below.

The opinion of the District Court [R. 24-28] is not reported.

Jurisdiction.

This appeal, in the consolidated cases, involves income taxes in the amount of \$5,181.78 for the year 1946 [R. 5, 13], and is taken from a judgment entered June 7, 1951 [R. 32-33]. These taxes were assessed against and paid by the taxpayers upon the filing of their returns on March 15, 1947 [R. 18]. Thereafter amended returns

were filed showing a lesser tax liability and claims for refund of the alleged overpayment of taxes were filed in May, 1949 [R. 23]. The claims were not acted upon within six months of their filing and suits for refund were filed on August 4, 1950 [R. 3-5, 11-13], in conformance with Section 3772 of the Internal Revenue Code. The District Court took jurisdiction of the cases under Section 1346, 28 U. S. C. Notice of appeal was filed on July 30, 1951 [R. 46], pursuant to Section 1291, 28 U. S. C., upon which the jurisdiction of this Court is based.

Questions Presented.

1. Whether or not the District Court Judge who tried and decided this case was disqualified from participation therein under Section 455, 28 U. S. C., because he had been the Collector of Internal Revenue when the taxes involved were paid.

2. Whether or not where, because of litigation in a subsequent year, a partner does not recover part of his share of the net assets in the dissolution of a partnership, he is entitled to adjust his distributive share of the net income of the partnership in the year of dissolution.

Statutes and Regulations Involved.

The statutes and regulations relating to this case are found in the Appendix, *infra*.

Statement.

1. The facts relating to the question of the propriety of Judge Westover's participation in this case may be summarized as follows:

The income tax returns of the taxpayers for the year 1946 were filed with the Collector of Internal Revenue for the Sixth District of California. At all times between July 1, 1943, and October 31, 1949, Harry C. Westover was the Collector of Internal Revenue for the Sixth District of California. [R. 18.] At some time after the latter date, although the date is not disclosed by the record, Harry C. Westover was appointed and took office as United States District Judge for the Southern District of California. After that date he did not at any time act as Collector of Internal Revenue. [R. 4, 9.]

The complaints in these cases were filed in the District Court for the Southern District of California on August 4, 1950. [R. 3-8, 11-13.] At preliminary hearings in the cases, on January 8, 1951, held before Judge Westover, counsel for the taxpayers directed the attention of the Judge to the fact that the taxes involved were assessed while he was Collector of Internal Revenue. [R. 52.] Judge Westover stated that he knew nothing about the cases but he said that if there were any objections to his sitting in the trial he would transfer the cases. [R. 52.] He asked counsel for both parties whether they were willing that he should try the issues and both agreed he should do so. [R. 52.] Later, at the opening of the trial on April 2, 1951, the Judge himself raised the question again as to his participation in the trial of the cases and again counsel for the parties consented and counsel for the taxpayers stated: "I again have no objection." [R. 54.]

On June 12, 1951, after the cases had been decided and judgment had been entered, the taxpayers filed a motion to vacate judgment and a motion for a new trial both alleging Judge Westover was disqualified in the cases under Section 455, 28 U. S. C. [R. 34, 37.] The motions were heard [R. 45], argued [R. 55-56], and denied. [R. 46, 56.] In this Court taxpayers assign error in that action.

2. The facts relating to the question of the taxability of the taxpayers' share of the 1946 net proceeds of the partnership, as stipulated or as found by the Court, may be summarized as follows:

The taxpayer William P. Neil was at all times between December 1, 1943, and September 30, 1946, a partner with LeRoy D. Owen in a real estate brokerage business operating under the name of "LeRoy D. Owen Company." [R. 18, 29.] The partnership was at no time licensed to do a real estate brokerage business but all during the period of the partnership Mr. Owen held a real estate broker's license, doing business as "LeRoy D. Owen Co.," and the brokerage business of the partnership was conducted under that license. [R. 19, 29.] The partnership was dissolved on September 30, 1946 [R. 21, 30], and the partners agreed between themselves as to the distribution of partnership assets. [R. 21-22.] In this distribution of assets Mr. Neil received \$3,505.87 in cash and shares of stock carried upon the partnership books at \$23,358.59. [R. 21-22.]

During the year 1946 the partnership had ordinary net income of \$63,719.67 [R. 20, 30], of which Mr. Neil's share was, pursuant to the articles of partnership, \$28,568.21, and this amount, divided equally under the com-

munity property laws of California, was included in the individual income tax returns of William P. Neil and his wife Mary Neil. [R. 18, 30.] Individual income taxes upon one-half, or \$14,284.10, were paid by each taxpayer. [R. 18.]

On March 3, 1947, William P. Neil brought suit against LeRoy D. Owen in a California court for the recovery of certain assets of the partnership due to Neil by virtue of the dissolution agreement. [R. 22, 25, 30.] The action ended in February, 1949, in the Superior Court of California, by judgment in favor of Mr. Owen [R. 22, 30], and an appeal by Mr. Neil was dismissed after the payment of \$1,000 by Mr. Owen to Mr. Neil. [R. 22.] The decision of the Superior Court was rendered in favor of Mr. Owen because Mr. Neil was not a licensed real estate broker and approximately 95% of the business of the LeRoy D. Owen Company was commissions on real estate sales. [R. 25.]

The partnership return for 1946 was filed on February 18, 1949, and showed a partnership net income of \$63,719.67 [R. 20], and in May, 1949, the taxpayers filed amended individual tax returns [R. 4, 9, 12, 14, 23] alleging the distributive share of the partnership income of Mr. Neil to be \$19,456.39. [R. 30.] Claims for refund of overpayment of taxes on that basis were filed by the taxpayers [R. 30] and, not having been acted upon within six months, suits for refund were brought. [R. 5, 10, 13, 15.] Those suits were decided in favor of the United States [R. 32-33], and the taxpayers' appeal from that decision followed. [R. 46.]

Summary of Argument.

1. There is manifestly no merit to the taxpayers' contention that Judge Westover was disqualified to pass upon the motions filed in this case or to try the issues in the District Court. When the question of his prior office as Collector of Internal Revenue was raised at preliminary hearings he stated he knew nothing of the cases or of any reason why he would be biased or prejudiced for or against either party, but he consented to transfer the cases if either party objected to his participation. Both parties on two different occasions consented to his trial of the cases, and not until after his decision was the question of his disqualification raised under Section 455, 28 U. S. C.

Whether any of the provisions of that section are mandatory, a matter for judicial determination, is of no consequence. The connotation of the term "of counsel" in the statute clearly does not include administrative and ministerial duties such as are performed by a Collector of Internal Revenue and Judge Westover was not disqualified on that condition. Moreover, he had no substantial interest in the cases. They were suits against the United States and the Judge would not, therefore, be affected by the decision. Judge Westover was not, therefore, disqualified on the "substantial interest" condition in the statute. The other conditions of the statute are not in point and there is thus no basis to sustain the taxpayers' attack upon Judge Westover's participation.

2. The taxpayers' contention that they are not subject to tax upon the full amount of Mr. Neil's distributive

share of partnership net income for 1946 because of subsequent litigation between the two partners ignores the actual situation in this case. There is no dispute whatever that the partnership had net income for 1946 up to the date of its dissolution and the amount thereof is not in dispute. Under the applicable law the taxability of Mr. Neil's distributive share is certain whether or not he withdrew it from the business and the record is silent on that point.

The taxpayers, however, assert that because Mr. Neil was unable to recover in the suit against Mr. Owen the taxes are not due, overlooking entirely the fact that the suit against Mr. Owen had no bearing upon partnership net income and each partner's distributive share. It was a suit to enforce collection from Mr. Owen of part of partnership assets due Mr. Neil in the partnership's dissolution and liquidation. The net income of the partnership had to be determined and certain before that dissolution and liquidation could take place and whether those assets included part of net earnings was a different matter. Moreover, the state court did not say that the partnership did not have income, it merely held that California courts could not be used to collect net assets upon dissolution under California law. In this connection, in any event, the rule is well established that state law cannot be controlling in matters of federal taxation.

ARGUMENT.

I.

The Trial Judge Was Not Disqualified to Try This Case nor to Pass Upon the Motion to Vacate Judgment Therein.

The taxpayers in this case, in this Court, attack the propriety of Judge Westover's participation in it in the District Court under Section 455, 28 U. S. C., Appendix, *infra*. The caption to this attack in the brief (p. 10) states that Judge Westover was disqualified to rule upon taxpayers' motion to vacate the judgment but in the argument it is stated that "the mandatory disqualification of the said trial judge to try the case, or to pass upon the motion to vacate the judgment, is apparent." (Br. 11.) It is not contended that the lack of clarity as to the extent of the asserted disqualification is consequential so far as the result of the case is concerned, but in line with the motion to vacate judgment [R. 34], the points and authorities filed therewith [R. 34-36], and the motion for new trial [R. 37] it would appear that the attack upon Judge Westover's participation is all inclusive.

There is manifestly no merit to the taxpayers' contention. The point actually appears first in the complaints filed in the District Court which alleged facts [R. 3-4, 11-12], admitted in the answers [R. 9, 14], relating to Judge Westover's prior office as Collector of Internal Revenue for the Sixth District of California, but in proceedings prior to the actual trial of the case it was agreed that Judge Westover should sit.

In these proceedings, set out in the record, Judge Westover, relying upon the pleadings, actually raised the question of his participation. [R. 52-54.] At the proceed-

ings on January 8, 1951, when taxpayers' counsel directed attention to Judge Westover's prior office, the Judge asked counsel whether they were willing for him to try the case. [R. 52.] The question was put to counsel after Judge Westover had said he knew nothing at all of this case but that if counsel had any objection to his sitting he would be glad to transfer the case to another court. [R. 52.] Taxpayers' counsel replied to Judge Westover's question that he was willing to have Judge Westover try the issues.

Again on April 2, 1951, the date on which the case was tried, Judge Westover said [R. 53-54]:

Before proceeding with this case, I have raised this issue before, and you said you were perfectly willing to continue with the matter. I also want to raise it again, because I don't want you to come in a little later on and say you have been penalized in any way. It appears from the pleadings that when this income tax return was originally filed, I was Collector of Internal Revenue. I said once before I never heard of the case, don't know anything about the case. I don't know any reason in the world why I should be biased or prejudiced for or against either party, but I am bringing it to your attention right now.

In response to this statement by Judge Westover, taxpayers' counsel said again he had no objection, as did Mr. Mitchell for the Government, and Judge Westover said he wanted that situation to appear in the record because he did not want anyone to raise a question about it a year or two hence. The situation was discussed again

at the hearings on the above-mentioned motions on July 16, 1951. [R. 55-56.] It is, perhaps, significant that the taxpayers do not set out the foregoing facts in their brief nor allude to them in any way.

Section 455, 28 U. S. C., is a revision of what was formerly Section 20, Judicial Code. It, however, removes the procedural aspects of the prior provision and imposes a duty upon a judge to disqualify himself in cases under specified conditions. Two of the conditions are matters especially within the knowledge of the judge; that is, whether he has a substantial interest in a case, and whether he is so related to or connected with any party as to make it improper, in his opinion, to sit in a case. The two other conditions are matters of public record; that is, whether he has been of counsel or a material witness in a case. Whether any of these conditions, as taxpayers argue, may be said to be mandatory, to preclude a judge's participation in a case is a matter for judicial determination.

We have found but one case arising under Section 455, that of *United States v. Maher*, 88 Fed. Supp. 1007 (Me.) but there are several arising under the earlier statutory provision relating to the interest of judges in particular litigation. In the *Maher* case, it was held that Section 455 compels a judge of a United States District Court to disqualify himself whenever he has been of counsel for either party in a case before him. That decision, which relied upon *United States v. Vasilick*, 160 F. 2d 631 (C. A. 3d), implies that if a judge sat in a case in which

he had been of counsel there might be grounds for reversible error but it does not otherwise label any of the conditions of Section 455 as mandatory. While *United States v. Vasilick*, and *In re Fox West Coast Theatres*, 25 Fed. Supp. 250 (S. D. Calif.), affirmed, 88 F. 2d 212, 226 (C. A. 9th), certiorari denied, 301 U. S. 710, rehearing denied, 302 U. S. 772, indicate classification under the earlier provision, other decisions generally have avoided such classification (*Utz & Dunn Co. v. Regulator Co.*, 213 Fed. 315 (C. A. 8th)); have recognized (1) that the disqualification might be waived (*Utz & Dunn Co. v. Regulator Co.*; *Borough of Hasbrouck Heights, N. J. v. Agrios*, 10 Fed. Supp. 371 (N. J.)), and (2) that a judge's connection with a case might be so remote or trivial as not to constitute a basis for disqualification (*Utz & Dunn Co. v. Regulator Co.*; *Voltmann v. United Fruit Co.*, 147 F. 2d 514 (C. A. 2d)). The rule of these other cases might appropriately be applied to Section 455 so as to deny the position taken by the taxpayers in this case.

In any event, however, taxpayers' contention avails them nothing here. Both the *Maher* case, *supra*, and the *Vasilick* case, *supra*, involved the question of a judge's participation in proceedings where at the time the defendant was tried and convicted and sentenced the judge had been the United States Attorney. Pointing to other sections of the Judicial Code (Sec. 771, Rev. Stat. in the *Vasilick* case, *supra*, and Sec. 507, 28 U. S. C., in the *Maher* case, *supra*), the courts said that there was no

doubt that a United States Attorney is "of counsel" for the United States in all criminal cases in his district. Those cases do not compel any conclusion that their rule disqualified Judge Westover in the instant case and, indeed, the taxpayers do not press any argument along that line in their reliance upon the *Vasilick* case. That would indicate that they recognize a wholly meritorious distinction between that case and their position here.

As a matter of fact, they appear to be uncertain as to whether any condition in Section 455 applies to Judge Westover's participation in this case. They assert that because the Judge had been the Collector of Internal Revenue he had a "substantial interest" and had "been of counsel" [Br. 11, R. 36] but in the next sentence they state, more nearly accurately, that the Judge had been an employee and agent of the United States in the assessment and collection of income taxes. Being "of counsel" and being an "employee and agent" are hardly synonymous in the connotation of the statute. Judicial notice of the usual and ordinary meaning of the term "of counsel" would recognize the distinction between representation of a client in or out of court as counsel, and the performance of ministerial and administrative acts as a Collector of Internal Revenue. That recognition precludes any disqualification of a judge founded upon the "of counsel" condition in Section 455. It is wholly without merit here.

Nor has it been or can it be shown that Judge Westover had any "substantial interest" in the instant cases. He stated on two different occasions that he knew nothing of

the cases [R. 52, 54]; a point of significance when it is borne in mind, as we have pointed out above, that that is one of the conditions in the statute the existence of which is especially within the knowledge of the judge. Moreover, the outcome was of no consequence whatever to Judge Westover. The suit was one against the United States from which he would derive no benefit however it was decided. Without conceding that the distinction is in any way material, the situation might be different if the suit had been against Judge Westover as Collector of Internal Revenue when a certificate of probable cause would have to be made under Section 2006, 28 U. S. C., but that is not the situation here.

The result is that the attack upon the propriety of Judge Westover's participation in the case has no substance whatever. None of the other conditions of Section 455 are relied upon by taxpayers and indeed they could not be. If counsel for the taxpayers could agree to his sitting when the question was first raised there was no change in the situation when a decision adverse to the taxpayers was rendered. Here, as was said in the decision in *Voltmann v. United Fruit Co.*, *supra*, the judge's connection with the instant case prior to its trial was so remote and trivial, actually only nominal, that the fault found by the taxpayers is hardly more than an attempt to bolster the disqualification motion and amounts but to an overemphasis of the trivial. As such it deserves no more endorsement by this Court than was given it in that case.

II.

The District Court Was Correct in Holding and Deciding That the Taxpayers Were Taxable Upon William P. Neil's Share of the Partnership's Ordinary Net Income for 1946 Regardless of Events in Subsequent Years.

The section of the Internal Revenue Code applicable to this case, that is, Section 182(c), Appendix, *infra*, provides that in computing the net income of a partner, his distributive share of the partnership's ordinary net income shall be included in his gross income whether or not distribution is made to him. Inasmuch as individuals carrying on business in the form of a partnership are, under Section 181 of the Internal Revenue Code, Appendix, *infra*, liable for tax only in their individual capacity, the reason for that provision is that, when the partnership's tax year is ended, the individual partners have constructively received their share of its ordinary net income whatever they do with respect to withdrawing it out of the business in cash or otherwise. That situation has been recognized in *Bourne v. Commissioner*, 62 F. 2d 648 (C. A. 4th), certiorari denied, 290 U. S. 650, and cases there cited; *Faesy v. Commissioner*, 1 B. T. A. 350; *Peterson v. Commissioner*, 27 B. T. A. 1009, and *Curtis v. Commissioner*, 3 T. C. 648, 662. In the *Faesy* case, *supra*, it was said that the fact that subsequent disagreement of one partner with the other, and litigation in connection therewith, has precluded the partner from ever receiving any of his money does not lessen his taxability upon it.

Applying the law and those decisions to the facts in this case there is no doubt that the District Court was correct in holding and deciding that the taxpayers were taxable

in 1946 upon William P. Neil's share of the ordinary net income of the LeRoy D. Owen Company partnership. There is no dispute that William P. Neil and LeRoy D. Owen were partners in that company from December 1, 1943, through September 30, 1946, and that fact is stipulated. [R. 18, 29.] Nor is there any dispute that the partnership had net income for the year 1946. [R. 20, 25, 30.] Moreover, it is stipulated that William P. Neil and his wife, under the community property laws, included in their 1946 returns the amount of \$28,568.21 as William Neil's share of the net income from the partnership for that year [R. 18], and it was found as a fact by the court that that amount was William P. Neil's distributive share. [R. 30.] The record is completely silent with respect to withdrawals of that amount, but in any event taxability on it was thus clearly fixed.

The taxpayers, however, attempt to avoid that correct and proper decision by reliance upon unrelated events occurring in subsequent years [R. 23, 25] and contend that because of those unrelated subsequent events the District Court rendered an erroneous decision. That contention can not prevail. The rule that income taxes must be computed and paid upon an annual basis is well established in income tax law (*Burnet v. Sanford & Brooks Co.*, 282 U. S. 359, 363, 365; *Dixie Pine Co. v. Commissioner*, 320 U. S. 516, and *Security Mills Co. v. Commissioner*, 321 U. S. 281) but the taxpayers urge this Court to ignore that rule by accepting unrelated propositions which have no place in the circumstances in the instant case.

We say the events upon which the taxpayers rely are unrelated because they did not pertain to the question of what was Mr. Neil's distributive share of the net income

of the partnership for 1946. The stipulation of facts set out that the net income of the partnership for 1946 was \$63,719.67 [R. 20]; that same amount is found by the Court as the net income of the partnership for 1946 [R. 30, 31] and in their brief in this Court the taxpayers state: "There is no dispute between the parties with respect to the 'earned' income of the partnership for the year 1946, which was \$63,719.67." (Br. 19.) Under the partnership agreement Mr. Neil's distributive share was one-half of that amount less salary to Mr. Owen of \$700 per month. That amount less \$6,300 (salary for 9 months at \$700) leaves \$57,419.67, one-half of which is \$28,709.88, and that amount, with an adjustment of \$141.67, was Mr. Neil's distributive share upon which taxes had to be paid.

There can be no question upon that point but the taxpayers refer to the litigation in 1947 through 1949 to deny that tax is due upon that amount. The litigation between Mr. Neil and Mr. Owen had nothing whatever to do with the partnership's net income. It was litigation by which Mr. Neil sought to recover from Mr. Owen "some of the assets of the copartnership which were to have been delivered to him upon its dissolution" [R. 25]; it was a suit "for the recovery of certain assets of the partnership due to Neil by virtue of the dissolution agreement." [R. 30.] The income was earned and Mr. Neil's distributive share was determined and certain before any distribution of assets in liquidation of the partnership was or could be made, and taxes are due and payable under the Internal Revenue Code and the decided cases whether or not it was distributed to him.

That is the actual and simple situation in this case. The taxpayers, however, confuse distributions made to William

P. Neil upon dissolution of the partnership on September 30, 1946, with his distributive share of partnership ordinary net income for 1946 and during the life of the partnership. (Br. 12, 13.) Whatever may have been the ultimate relationship, if any, between the distribution of assets upon dissolution and the distributive share of partnership net income for 1946, the fact remains that this case in the District Court and in this Court involves merely the question of taxability of Mr. Neil's share of the partnership net income for 1946. That question can not be complicated by computations as to what Mr. Neil had received from the partnership during its life.

The taxpayers further attempt to avoid tax liability by reliance upon provisions of the California Business and Professions Code, and the decision of a California court concerning Mr. Neil's ability to collect from Mr. Owen his part of partnership assets upon dissolution. This is the subsequent event upon which they rely to defeat taxes due and payable. As is pointed out above, this case involves income taxes for 1946, derived from the operation of a partnership to September 30 of that year. In March, 1947, Mr. Neil sued Mr. Owen for recovery of amounts due upon liquidation and not until 1949, three years after the partnership was dissolved, did Mr. Neil find out that he could not, under California law, recover assets to which he was entitled upon dissolution of the partnership. In so deciding the California court did not say that Mr. Neil did not earn income from the partnership in 1946. It merely held he could not collect assets from his former partner through the California courts.

This situation is aptly pointed up in the opinion of the District Court Judge when he states that even if the Business and Professions Code of California provides that

it may be unlawful to divide a real estate agent's or broker's commission with a non-licensed person and that California courts may not be used for the collection of fees and compensation under that circumstance, that Code does not declare that fees or compensation of an unlicensed broker are not income. [R. 27.] It could not so declare from the standpoint of federal income taxation and in reliance upon that law and that decision the taxpayers are met by another well-established rule that the operation of federal taxing statutes is not subject to state law. (*Burnet v. Harmel*, 287 U. S. 103, 110; *Weiss v. Wiener*, 279 U. S. 333, 337; *Morgan v. Commissioner*, 309 U. S. 78, 80, and *California Iron Yards Co. v. Commissioner*, 47 F. 2d 514 (C. A. 9th).) The simple fact is that even if the partnership agreement were not valid under the California law, and even if Mr. Neil could not enforce collection of his share of partnership net assets upon dissolution in its courts, the partnership existed from December 1, 1943, to September 30, 1946, and had net income and the taxpayers are taxable upon Mr. Neil's distributive share in 1946 whether or not it was ever distributed to him.

Moreover the taxpayers further attempt to avoid the correct application of Section 182(c) of the Internal Revenue Code by a misapprehension and misapplication of the "claim of right" rule to income as used in *United States v. Lewis*, 340 U. S. 590, rehearing denied, 341 U. S. 923 (Br. 16-17), and the definition of "earned income" for a particular purpose. (Br. 19.) The District Court Judge in using the latter term in his opinion [R. 26, 28] was not referring to receipt. He was referring to the incidence of tax and cited *United States v. Lewis*, *supra*, not because of its discussion of the claim of right doctrine,

however applicable it may have been there, but to support the correct theory that whether or not Mr. Neil received his distributive share in 1946 it was nonetheless earned net income of the partnership upon which, under Section 182(c), income tax had to be paid by the partners in their individual capacity. In *United States v. Lewis, supra*, the Supreme Court said income taxes must be paid upon income received during an annual accounting period. Mr. Neil constructively received his share of the partnership net income for 1946 when it was dissolved and tax is due upon it for that year regardless of the litigation in subsequent years which denied him the right to collect from Mr. Owen his share of unpaid partnership assets.

It is noteworthy that taxpayers use the "claim of right" doctrine to conclude that the income of the partnership was that of Mr. Owen. (Br. 16.) He is not the taxpayer here. The doctrine can, however, be used conversely to show that the net income was income of the taxpayers. It is also noteworthy that despite so contending and despite their contention that under California law the partnership was invalid and Mr. Neil had no rights to any income, the taxpayers apply the "claim of right" rule to admit that the amounts paid to Mr. Neil in 1943, 1944 and 1945 were proper. (Br. 18.) If that were so in those years it was also so in 1946 and that in effect is what the District Court has decided.

In relying upon the definition of "earned income" in Section 116(a)(3) of the Internal Revenue Code, Appendix, *infra*, the taxpayers ignore completely the fact that the definition of that term there given is for the purpose of computing what income from sources outside of the United States is excludable from gross income of a taxpayer and is exempt from taxation. The definition

has no other purpose or intent and can not be lifted from the context of the Internal Revenue Code to be used to label as not taxable income that part of the net proceeds of partnership operation which that Code elsewhere includes in income. See Sections 22(a), 181, 182(c), Internal Revenue Code, Appendix, *infra*.

The taxpayers rely upon *Reinschmidt v. Commissioner*, 28 F. 2d 660 (C. A. 5th). It is not in point in this case. There the taxpayer sought to adjust his taxes because he had erroneously included as exclusively his income proceeds from the sale of partnership property. When the other partners objected he adjusted his books to include only his share and this was permitted correctly to reflect his income for the taxable year. Here there is no such situation. The taxpayers here attempt to deny that their share of partnership net income is taxable in the year earned and that may not be done under applicable provisions of law.

The decision of the District Court in this case, on the other hand, is in accordance with the rule of *Bourne v. Commissioner, supra*. While in that case no litigation was involved, and the situation was otherwise different from this case, there the partner was nonetheless held to be subject to the tax upon his share of partnership net proceeds even though they were not distributed to him and were retained by other partners. See in this connection also the case of *Faesy v. Commissioner*, 1 B. T. A. 350, in which, as pointed out above, it was held that despite disagreement between partners and litigation in connection with the payment of the net proceeds from the operation of a partnership the partner was taxable upon his share even though it was not paid to him.

Conclusion.

The decision of the District Court is correct and should be affirmed.

Respectfully submitted,

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January, 1952.





APPENDIX.

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition.* — “Gross income” includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * * * *

(26 U. S. C. 1946 ed., Sec. 22.)

SEC. 116. EXCLUSIONS FROM GROSS INCOME.

In addition to the items specified in section 22(b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) [as amended by Section 148, Revenue Act of 1942, c. 619, 56 Stat. 798, and Section 107, Revenue Act of 1943, c. 63, 58 Stat. 21] *Earned Income from Sources Without United States.*—

* * * * *

(3) *Definition of earned income.*—For the purposes of this subsection, “earned income” means wages, salaries, professional fees, and other amounts received as compensation for personal services actually rendered, but does not include that part of the

compensation derived by the taxpayer for personal services rendered by him to a corporation which represents a distribution of earnings or profits rather than a reasonable allowance as compensation for the personal services actually rendered.

* * * * *

(26 U. S. C. 1946 ed., Sec. 116.)

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.
(26 U. S. C. 1946 ed., Sec. 181.)

SEC. 182. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

* * * * *

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183(b).

(26 U. S. C. 1946 ed., Sec. 182.)

SEC. 183. COMPUTATION OF PARTNERSHIP INCOME.

(a) *General Rule.*—The net income of the partnership shall be computed in the same manner and on the same basis as in the case of an individual, except as provided in subsections (b) and (c).

(b) [as amended by Section 150, Revenue Act of 1942, *supra*] Segregation of Items.—

* * * * *

(2) *Ordinary net income or loss.*—After excluding all items of * * * gain and loss from sales or exchanges of capital assets, there shall be computed—

(A) An ordinary net income which shall consist of the excess of the gross income over the deductions; or

(B) An ordinary net loss which shall consist of the excess of the deductions over the gross income.

* * * * *

(26 U. S. C. 1946 ed., Sec. 183.)

28 U. S. C.:

SEC. 455. INTEREST OF JUSTICE OR JUDGE.

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

SEC. 2006. EXECUTION AGAINST REVENUE OFFICER.

Execution shall not issue against a collector or other revenue officer on a final judgment in any proceeding against him for any of his acts, or for the recovery of any money exacted by or paid to him and subsequently paid into the Treasury, in performing his official duties, if the court certifies that:

(1) probable cause existed; or

(2) the officer acted under the directions of the Secretary of the Treasury or other proper Government officer.

When such certificate has been issued, the amount of the judgment shall be paid out of the proper appropriation by the Treasury.

Treasury Regulations 111, promulgated under the Internal Revenue Code:

Sec. 29.182-1. *Distributive Share of Partners.*—(a) Each partner is required to include in his return for his taxable year within which or with which the taxable year of the partnership ends, whether or not distributed:

* * * * *

(3) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183(b).

(b) If separate returns are made by the husband and wife domiciled in a community property State, and the husband only is a member of a partnership, the part of his distributive share of gains and losses of the partnership from sales or exchanges of capital assets or the part of his distributive share of ordinary net income or ordinary net loss, which is, or is derived from, community property should be reported by the husband and by the wife in equal proportions. * * *

No. 13109.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARY NEIL and WILLIAM P. NEIL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANTS.

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I.

In arguing that Judge Westover was not disqualified to pass upon the motions filed in this case or to try the issues in the District Court, respondent makes the following points (Resp. Br. p. 6):

1. Appellant had waived the disqualification and consented to the trial of the case by Judge Westover.

2. It "is of no consequence" whether the provisions of Section 455, 28 U. S. C., are mandatory.

3. Judge Westover in his former official capacity as Collector of Internal Revenue was not "of Counsel" for respondent, nor did he have a "substantial interest" in the case.

As respondent states, the case of *United States v. Maher*, 88 Fed. Supp. 1007 (Me.), which is the *only* case in which Section 455 has been considered (Resp. Br. p. 10), is authority for appellant's contention that Section 455 compels a judge of a United States District Court to disqualify himself whenever he has been "of counsel" for either party in a case before him or has a "substantial interest" in the case. Section 455 is, therefore, mandatory to this extent, as urged by appellant. There can be no waiver of a disqualification by either or both parties, if the disqualification is mandatory. (48 C. J. S. 1101.)

Prior to the appointment of Judge Westover as Collector of Internal Revenue he was an attorney, being, in fact and as a matter of public record, a former Judge of the Superior Court of California in and for the County of Riverside. As Collector of Internal Revenue it was one of his duties to interpret and enforce the federal laws relating to income and other federal taxes. Being a "Collector" of taxes, he may surely be said to have had a "substantial interest" in the collection of the very taxes, collected during his term as Collector of Internal Revenue, the refunding of which forms the basis for this litigation. (Section 3641, *Internal Revenue Code*.)

II.

Respondent's summary of the second point is as follows (Resp. Br. p. 14):

"The District Court was correct in holding and deciding that the taxpayers were taxable upon William P. Neil's share of the partnership's ordinary net income for 1946 regardless of events in subsequent years."

This is a most inexact statement of the main question involved which is, as set forth in Section 182, *Internal Revenue Code*, what is: "his (appellant's) distributive share of the ordinary net income" of the partnership, "whether or not distribution is made to him" (Resp. Br. App. p. 2).

Respondent relies, principally, upon *Bourne v. Commissioner*, 62 F. 2d 648 (C. A. 4th), certiorari denied, 290 U. S. 650, and upon *Faesy v. Commissioner*, 1 B. T. A. 350.

In the *Bourne* case, taxpayer simply chose to withdraw, from a law firm in which he was a partner, all of his share of the profits for the year 1926. His partners were solvent and were responsible to him for the payment of the undrawn portion of the profits upon demand by taxpayer. Clearly, this case is not in point here.

In the *Faesy* case, taxpayer Faesy, who was an employee of Suter & Co., a partnership, at the time, was made a partner in July, 1920, pursuant to an oral agreement under which he was to be credited with 10% of the profits of the firm. In May 1921, a new arrangement was made in writing. At the time of the Board of Tax Appeals hearing, Faesy had not collected from the partnership all of the credits due him but had made certain cash withdrawals which, it was conceded, were due him. In litigation pending in the New York State Courts at the time of the Board hearing, the Suter & Co. partnership had been held to be a legal partnership and Faesy to be a valid partner therein. The New York litigation was still in progress at the time of the Board hearing.

Similarly, *Curtis v. Commissioner*, 3 T. C. 648, cited by respondent, is simply authority for the correct statement that a partner could not postpone the payment of income taxes upon his share of the profits of a joint venture by accepting corporate stock as such share, in lieu of cash.

The case most similar to the Neil situation here is that of *Reinschmidt v. Commissioner*, 28 F. 2d 660 (C. C. A. 5th), which is discussed in Appellant's opening brief at page 17.

Respondent's urge that Mr. Neil must account for the income tax upon that portion of the partnership income accruing to him under the specific provisions of the partnership agreement, whether or not, Mr. Neil was legally entitled ever to receive such income. (Resp. Br. pp. 16-17.) The absurdity of the invoking of such a harsh and inequitable rule is apparent when the cases of *Wise v. Radis*, 74 Cal. App. 765, 242 Pac. 90, and *Del Rey Realty Co. v. Fourl*, 44 Cal. App. 2d 397, 112 P. 2d 649, are reexamined. These cases are discussed on pages 14 and 15, respectively, of appellant's opening brief. Under the theory of respondent (Resp. Br. p. 18), plaintiffs Wise and Del Rey Realty Co. must account for taxable income from joint ventures (classed as partnerships for purposes of federal income taxation), which they never received, or could receive, whereas defendants Radis and Fourl could enjoy a portion of their income from the joint ventures free of all income tax thereon, although they received such income, retained it, and were not accountable to plaintiffs Wise and Del Rey Realty Co. for it. (Section 10137 of the *Business & Professions Code* of the State of California, as quoted upon page 14 of appellant's opening brief.)

In *Republic Oil Refining Co. v. Granger* (D. C. Pa., June 21, 1951), 98 Fed. Supp. 921, the true rule as to the applicability of State laws to the subject of federal taxation is aptly stated as follows:

“The local rule will be followed whenever the applicability of a federal revenue statute is dependent upon fact which can be interpreted only in accordance with State rules of property.

“A thing which is within the letter of statute imposing a tax is not within the statute unless it is within intention of Congress.”

It cannot be inferred that the intent of Congress in enacting Sections 180 to 183 of the *Internal Revenue Code* was to levy an income tax on the partner who did not receive income, due to the provisions of the laws of California (Sections 10130, 10137, of the *Business & Professions Code*), and to hold free of income taxes the partner who received and retained the income under the provisions of the laws of California.

Appellant assumes that respondent does not contend that both Neil and Owen are subject to income tax upon the same income.

In *Burnet v. Harmel*, 287 U. S. 103, 110, cited by respondent on page 18 of the brief, the pertinent holding of the Supreme Court was to the effect that the determination of federal income tax on gain from the sale of capital assets could not be controlled by a law of the State of Texas which unlike that of other states, regarded an oil and gas lease as a present sale of the oil and gas in place.

A nationwide scheme of taxation must be given a uniform application, citing *Weiss v. Weiner*, 279 U. S. 333, 337.

In *Morgan v. Commissioner*, 309 U. S. 78, 80, also cited by respondent on page 18, it was held that the terminology of a definition of a "special power" as applied to an appointment by a decedent, contained in the laws of Wisconsin, could not control the federal taxation of such a "special power."

The foregoing cases are obviously inapplicable to the facts of this case.

Referring to page 19 of respondent's brief *re* the "claim of right" doctrine, appellant again avers that Mr. Neil is taxable upon that portion of the partnership income for the years 1943, 1944, 1945 and 1946 which was "distributed" to Neil in the year 1946 (There were no distributions of income to Neil prior to the year 1946. [Tr. p. 21.]) After the income was distributed to Neil, he held it under a "Claim of right." Although Owen could have retained *all* of the partnership income under the provisions of the California law in that it was "distributive" under such law to Owen only, who was in possession of the income and might retain it, nevertheless Owen, prior to the receiving of advice of his Counsel in the California case of *Neil v. Owen*, Superior Court of Los Angeles County [Exs. 5-6], did "distribute" a substantial portion of the partnership income to Neil. The retained portion of the partnership income was held by Owen under a "Claim of right." *United States v. Lewis*, 71 S. Ct. 522; 340 U. S. 590; rehearing denied, 341 U. S. 923.

Conclusion.

For the foregoing reasons, as well as those stated in appellant's opening brief, appellants urge:

1. That the action of the District Court in denying appellant's motion to vacate the judgment be reversed and the case remanded to the District Court with instructions to grant a new trial before a District Judge other than Judge Harry C. Westover.

2. In the alternative, that the judgment of the District Court be reversed and the case remanded to the District Court with instructions to enter judgment in favor of appellants.

Respectfully submitted,

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